OFFICE SUPREME COURT U.S.
FILED
MAR 17 1881
JAMES H. McKENNEY, CLERK

No. 266.

In the Supreme Court

OF THE

UNITED STATES.

WM. ADAM et al.

VS.

J. R. NORRIS et al.

In Error to the Circuit Court of the United States for the District of California.

BRIEF FOR PLAINTIFFS IN ERROR.

S. F. LEIB, - - - Counsel for Plaintiffs in Error.

Received a copy of the within, this.....

day of.....*188*

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Attorney for Defendants in Error.

Filed .....

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SAN JOSE:
PIONEER BOOK AND JOB PRINT.
1881.

No. 266.

In the Supreme Court

OF THE

UNITED STATES.

WILLIAM ADAM AND
J. L. SHUMAN,

Plaintiffs in Error.

Vs.

J. R. NORRIS,
VAN ROBBINS ET AL.

Defendants in Error.

Brief of Plaintiffs in Error.

I.

STATEMENT OF CASE.

The action was ejectment brought by the plaintiffs in error against the defendants in error and certain other parties, sued by fictitious names, to

recover a tract of land in Santa Barbara county in the State of California, of about five thousand acres in extent as a part of a Mexican grant called "Punta de la Laguna."

The action was brought in the District Court of the First Judicial District of the State of California, for Santa Barbara county. The complaint is in the usual form in such case, and was duly verified under the California Code of Practice.

Transcript folios 1 to 5.

The cause was on the application of the defendant Leroy (a Frenchman) transferred to the United States Circuit Court for the District of California for trial.

Transcript folios 19 and 20.

The defendants filed an answer in said Circuit Court November 26th, 1877. This answer however not being verified was not considered; and is of no service in the record.

Transcript folios 19 to 22.

The defendants afterwards and on the 2nd of April, 1878, filed a verified answer; on which they went to trial.

Transcript folios 22 to 28.

In this answer the defendants in error for a denial of the plaintiffs' title used the following language, viz:

"They deny that on the first day of June, 1877, the said plaintiffs were or at any time since have been or now are the owners or entitled to the possession of *all* that certain piece, parcel or tract of land described in the complaint."

Transcript folio 24.

They made no other denial of the plaintiffs' title to the demanded premises, and to this we call the Court's especial attention as we shall insist that under the California code of practice it is no denial of the plaintiffs' title, but an admission thereof; and that the plaintiffs never waive the right to insist on the point; that such an answer does not state facts sufficient to constitute a defence, but may insist thereon at all times and have the full advantage of the same.

Upon the trial the plaintiffs dismissed without prejudice the action as to all the defendants sued by fictitious names.

Transcript folio 27.

The amount involved being considerable and the questions presented of much importance the Court made special and full findings of all the facts presented some of which we deem immaterial and of no value in the constroversy, but shall state them in their order so the Court may have a full and clear conception of the controversy.

Transcript folios 28 to 86.

The facts found are in brief as follows, viz:

1st—That the defendants in error were at the commencement of the action and ever since the 2d day of June, 1876, have been in the possession of the demanded premises claiming title thereto adverse to plaintiffs, that the defendant Leroy claimed the premises as owner under a patent of the United States dated March 1, 1870, and the other defendants were his tenants, which patent is set out in the 10th finding.

2d—The value of the use and occupation of the premises sued for was $1.50 per acre per annum and there were 5,100 acres therein.

3rd—On the 21st day of March, 1840, the Mexican Government granted to Teodoro Arrellanes and Diego Olivera the Rancho "Guadalupe," which grant was finally confirmed to the grantees under the acts of Congress and surveyed by the United States authorities.

4th—On the 30th day of June. 1866, a United States patent in the usual form in such cases was prepared by the Commissioner of the General Land Office under the seal of that office, signed by the President and countersigned by the Recorder of the General Land Office and recorded by him in said office, in Liber 6 at pages 87 to 92. The whole of said patent is set out in this finding except the map.

It contains the usual certificates and full recitals in patents of this class under the several

acts of Congress governing such cases, and it appears on its face, that the survey was made, approved and published under the Act of Congress of June 14, 1860. Among the matters in said patent contained is the usual U. S. Surveyor General certificate dated San Francisco, May 25, 1863, which certificate contains the following, viz: "The said tract (referring to that confirmed) has been surveyed in conformity with the grant thereof and said decision, and I do hereby certify the annexed map to be a true and accurate plat of the said tract of land, as appears by the field notes of the survey thereof made by J. E. Terrill, deputy surveyor, in the month of September, 1860, under the direction of this office, which having been examined and approved, are now on file therein; and I do further certify that in accordance with the provisions of the Act of Congress, approved on the 14th day of June, 1860, entitled "An Act to define and regulate the jurisdiction of the District Courts of the United States in California, in regard to the survey and location of confirmed private land claims," I have caused to be published once a week for four weeks successively in two newspapers, to wit: "The Santa Barbara Gazette," published in the County of Santa Barbara, being the *newspaper published nearest to where the said claim is located*, the first publication being on the 14th day of February, 1861, and the last on the

17th day of March, 1861; also in the "Los Angeles Star," a newspaper published in the City and County of Los Angeles, the first publication being on the 23d day of February, 1861, and the last on the 16th day of March, 1861, a notice that the said claim had been surveyed and a plot made thereof and approved by me; and I do further certify that said approved plot of survey *was* retained in this office *during all of said four weeks*, and until the expiration thereof subject to inspection, and I do further certify that no order for the return thereof to the United States District Court has been served upon me; and I do further certify that under and by virtue of the said confirmation, survey, decree and publication the said Diego Olivera et al, are entitled to a patent from the United States upon the presentation thereof to the General Land Office of the said tract of land."

Transcript, folios 33 and 34.

Note.—It did not appear nor was it found who demanded or presented this certificate to the General Land Office.

This patent was signed by President Andrew Johnson.

The plat forming a part of the patent was properly endorsed and certified under the said Act of Congress of June 14th, 1860.

Transcript, folios 42 and 43.

5th—On the 2nd of August, 1866, J. M. Edmonds, then Commissioner of the General Land Office, transmitted the above patent to the U. S. Surveyor General for California for delivery, and it was received by him at San Francisco as early as August 27th, 1866.

Transcript, folio 44.

6th—Upon receiving notice of said patent, John B. Ward then the owner of the grant by purchase, promptly refused to accept it on the grounds that the survey was not in accordance with the grant and decree, and that no legal notice of the survey and approval thereof had been given, and that the patent was void.

Transcript, folio 44.

7th—Ward presented to the Commissioner of the General Land Office a petition, affidavits and other documents which he claimed showed that there had been no legal publication of the notice of the survey and approval thereof, and that the survey was erroneous, and asked that a re-survey be made and that a patent issue upon a new and corrected survey.

Transcript, folio 45.

8th—On the 22nd of October, J. S. Wilson, then Commissioner of the General Land Office, acting on this showing made by Ward, expressed the opinion that the survey was wrong, and in-

structed the U. S. Surveyor General for California :

1st—To return this patent;

2nd—To notify all parties whose interest might be affected that a re-survey had been applied for, and to fix a day for the hearing of all parties interested;

3rd—After such hearing to determine the true locus contemplated by the confirmation, then to make such survey and publish it under the Act of 1864, and return it with his judgment.

This patent was accordingly returned to said Commissioner.

Transcript folio 46.

9th—A new survey was thereupon made of said grant in accordance with the claim of Ward and with said instructions, under the direction of said Surveyor General, which was approved and on the 1st day of March, 1870, a second patent of the United States to said Rancho was made out and signed, sealed and recorded in the usual form.

Transcript folio 47.

10th—This second patent is set out in the 10th finding and contains the usual recitals of a Mexican grant patent issued under the Act of 1864 and is signed by President *U. S. Grant.* The survey upon which it was issued was made in February, 1867, and contains 43,631.95 acres of land whereas

the first survey and patent contained only 32,-408.05 acres of land. The second patent therefore is for 11,223.90 acres more than the first. Something of a difference.

Transcript folios 42 and 48 to 55.

11th—This second patent was forwarded by Wilson Commissioner by mail to the U. S. Surveyor General at San Francisco for delivery, but before its arrival said Commissioner by telegraph directed the Surveyor General to return it to the General Land Office, which was done and it has ever since remained in the General Land Office. The recall and return of this patent was without the knowledge or consent of the patentees or confirmees or any successor or successors in interest of them.

Transcript folio 56.

12th—May 6th, 1873, the defendant Leroy, then sole owner of the Guadalupe grant, obtained from the Commissioner of the General Land Office under the seal thereof an exemplified copy of the patent of March 1st, 1870, which he caused to be recorded on March 17th, 1877, in the Recorder's office of Santa Barbara county in which county the larger part of said lands lie; which exemplified copy was introduced in evidence on the trial of this cause by the defendants as evidence of Leroy's title.

Transcript, folio 57.

13th—On the 12th of June, 1873, the first Guadalupe patent, the one of 1866, was again transmitted by the Commissioner of the General Land Office to the said Surveyor General of California for delivery. Leroy, then sole owner of the grant, did not take it out, but it remained in the custody of the Surveyor General unclaimed by any one until taken out as next below stated.

Transcript, folio 57.

14th—On the 27th day of April, 1877, certain parties to whom said Leroy had before then sold and conveyed certain portions of said Rancho included in both patents, but no part of the land sued for in this action by their agent, but without the knowledge or consent of Leroy applied for and obtained from said Surveyor General the said patent of June 30th, 1866, which patent was recorded at the request of one of said parties in the Recorder's office of said Santa Barbara county April 3rd, 1877, which patent was introduced in evidence on the trial by the plaintiffs as evidence of an acceptance thereof by some of the successors in interest of the original grantees and as the legal patent to said grant.

Transcript, folio 59.

15th—There was no other delivery or acceptance of these patents than the facts found show.

Transcript, folio 59.

16th—The demanded premises occupied by the defendants are outside of the limits of the Guadalupe patent of June 30th, 1866, but within the calls of the Guadalupe patent of March 1, 1870, and the last named patent includes all the land embraced in the first.

Transcript, folio 59.

17th—Prior to Feb. 1st, 1863, the patentees and confirmees of the Guadalupe Rancho conveyed it to Luis J. Burton, Myles D. Sweeney and Edward Martin, on March 6th, 1863, Sweeney and Martin conveyed it to Juana M. Estudillo; on Feb. 13th, 1863, said Burton conveyed it to Juana M. Estudillo, who, on August 16th, 1864, conveyed it to John B. Ward, who Oct. 1st, 1870, re-conveyed to Juana M. Estudillo, and she on the 1st of Oct., 1870, convey it to the defendant Leroy. In one of these deeds through which Leroy claims, viz: that from Arellanes to Lewis J. Burton, dated Dec. 9th, 1862, the lands conveyed are described as follows, viz: "All that certain tract of land, farm or rancho known as the Rancho Guadalupe, situated in the County of Santa Barbara, State of California, and bounded by the Rancho de Nepoma, La Laguna, Cas Mali, and Jesus Maria and being the same tract granted by Juan B. Alvarado, Governor of the Department of California, on the 21st day of March, 1840, to Diego Olivera and Teodoro Arrellanes containing within its boun-

daries eight square leagues more or less in *conformity with* the *final survey thereof* by the *United States Surveyor General for the* State of California."

Transcript, folios 60 and 61.

18th—The deed from Louis J. Burton to Juana M. Estudillo, described the rancho after given the name, county and out boundaries as "*containing* within its *said* boundaries thirty-two thousand *four hundred and eight acres* in *conformity with the final survey thereof* by the *Surveyor General of the U. S. for the State of California, and by him approved on the 29th day of January*, 1861."

Note.—This shows that the owners knew of the survey and approval, and accepted it and conveyed by it.

Transcript, folio 62.

19th—The deed of Sweeny and Martin to Mrs. Estudillo gave the name and boundaries but did not refer to the final survey.

Transcript, folio 62.

20th—The deed of this rancho of August 16th, 1864, from Juana M. Estudillo to John B. Ward in its description contains as part thereof," *and the same land which is described in the map or plan* of *survey* of *said Guadalupe Rancho made by J. E. Terrill, in September* A. D. 1860, *and now on file in the office of the United States Surveyor General for California.*"

Transcript, folio 63.

Note.—Now this shows that Ward took his deed *by this survey* some two years before he questioned the survey.

21st—Mrs. Estudillo's deed to the defendant Leroy (incorrectly printed in the transcript as to the plaintiff), does not refer to the survey.

Transcript, folio 65.

22nd—The Court finds the following notice taken from the records of the Surveyor General's office to be the notice referred to in the patent of the Guadalupe grant of 1866 as published, viz:

"San Francisco, February 12th, 1861.

In compliance with the first section of an Act of Congress approved June 14th, 1860, regulating surveys of private land claims surveyed in pursuance of the thirteenth section of an Act entitled: 'An Act to ascertain and settle private land claims in the State of California,' approved 3rd March, have been examined and approved by me.

Name of Rancho, Guadalupe. Confirmee, Diego Olivera et al.

* * * * * *

The plat will be retained in this office subject to inspection for four weeks from the date of this publication.

JAMES M. MANDEVILLE,
U. S. Surveyor General."

Note—This fact we think wholly immaterial and that no such showing could be made in an action at law; and that the following matter is in the same category:

23rd—The affidavits on which the Commissioner acted in recalling the patent of 1866,

showed that the Santa Barbara "Gazette" was printed in San Francisco and immediately forwarded to Santa Barbara for distribution; that it usually took three to four days for the papers to get to Santa Barbara; and one affiant stated that he was a resident of Santa Barbara in January and February, 1861, and was a subscriber for the paper; that the receipt of the paper was often delayed from one to four weeks after its publication. These affidavits did not show the dates at which said paper was printed at San Francisco, nor when the particular numbers containing the notice were distributed at Santa Barbara.

24th—The Mexican Nation, Dec. 29th, 1844, granted to Luis Arrellanes and Esides Miguel Ortega the Rancho Punta de la Laguna which was finally confirmed to them in pursuance of the Act of Congress of March 3rd, 1851, to the extent of six square leagues; this rancho was surveyed by the United States authorities which survey was confirmed and a patent in due and usual form in such cases, was issued to the parties thereunto entitled, Oct. 2nd, 1873. This patent is also set out in the findings and is full in its recitals; shows a survey made under the same Acts of Congress as the first Guadalupe patent; that the survey and plat was January 29th, 1861, properly published under the Act of June 14th, 1860; the certificate and recitals in that respect being very full.

The plat forming a part of it had the like endorsements as the Guadalupe patent of 1866, showing due approval and proper publication.

Transcript, folios 64 to 80.

25th—The patent of the Rancho Punta de la Laguna above named embraced in its calls all of the premises sued for and the plaintiffs deraigned title thereunder to an undivided one-sixth of the whole Rancho. The western line of the land described in this patent coincides with the eastern line of the land described in the Guadalupe patent of 1866.

Transcript, folios 80 and 81.

26th—J. M. Edmonds was Commissioner of the General Land Office from March 18th, 1861, to August 31st, 1866, and J. S. Wilson was such Commissioner from September 1st, 1866 to February 4th, 1871.

Transcript, folio 81.

27th—December 19, 1873, the defendant herein Leroy brought an action of ejectment in the U. S. Circuit Court for the District of California against a number of the defendants in this action and others to recover the possession of this same tract of land alleging title thereto; the defendants answered denying his title and right of possession; the plaintiffs herein, but without becoming parties to the record in any way, employed and paid counsel in said suit and defended said action, and

in that action Leroy had judgment, which has never been set aside, reversed or annulled, and in 1876 ousted these plaintiffs and the defendants in that action under the writ of possession in said action issued.

Transcript, folios 82 to 84.

28th—The value of the demanded premises is more than $5,000.

Transcript, folio 84.

29th—The plaintiffs showed no other title than that shown in the findings, viz: Title under the Laguna patent.

The Court draw as a conclusions of law from the foregoing facts that the plaintiffs were not seized of the premises nor any part thereof, and were not entitled to the possession thereof, and that the defendants were, and ordered a judgment for costs in favor of the defendants which was entered accordingly, and the plaintiffs bring the case here on writ of error.

Transcript, folio 85.

The foregoing is perhaps a prolix statement of the case, but it was deemed advisable to make it quite full, as it lessens the labor of the Court to some extent.

II.

Assignments of Error and Prayer for Reversal of Judgment.

Now come the plaintiffs in error above named

before the Justices of the Supreme Court of the United States, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st—The Court below erred in holding and deciding that the plaintiffs were not seized of the premises or entitled to the possession thereof.

2nd—The Court below erred in refusing the plaintiffs a judgment for possession of the demanded premises, and for their costs of suit and damages upon the facts found, and also for part of an answer denying the plaintiffs' title.

3rd—The Court below erred in awarding the defendants a judgment for costs.

4th—The Court below erred in holding and deciding the so called Guadalupe patent of 1870, to be of any validity as an instrument conveying title.

5th—The Court below erred in deciding that the patent of the Rancho Punta de la Laguna, under which the plaintiffs claimed, did not convey a valid legal title as against the second patent of the Guadalupe Rancho under which the defendants claimed title.

6th—The Court below erred in rendering a judgment in favor of the defendants on the facts found.

7th—The Court below erred in drawing con-

clusions of law against the plaintiffs and in favor of the defendants, on the facts found.

8th—The Court below erred in permitting any facts to be shown tending to impeach the first Guadalupe patent the action being one purely at law.

Wherefore said plaintiffs in error pray that the judgment aforesaid be reversed with costs and that the Court below be ordered and directed to enter a judgment in favor of plaintiffs and against the defendants, on the facts as found for the possession of the demanded premises and the damages by them sustained and for their costs.

III

Argument of Plaintiffs in Error.

There are a number of standpoints from which this case can be argued, several of which we beg to present.

The natural order will be to present the plaintiffs' title first under which they claim.

The Laguna patent of October 2nd, 1873, includes the land sued for, and establishes a *legal title in fee in the plaintiffs'* deraigning their title thereunder, as against the defendants deraigning title under the Guadalupe patent (so called) of March 1st, 1870, which also includes the demanded premises.

The Laguna patent as appears by its recitals was issued in pursuance of a survey of said grant made by authority of the United States in September, 1860 (after the grant had been finally confirmed), which survey was approved by the U. S. Surveyor General January 29th, 1861, and published in February and March, 1861, in strict compliance with the Act of Congress of June 14th, 1860. This survey become final and conclusive at the expiration of said publication; no objections having been made thereto and no order made for its return into Court.

While the Guadalupe patent of 1870, as appears *by its recitals was issued* March 1st, 1870, in pursuance of a survey of said grant made in February, 1867 (some *six years after the Laguna survey became final*), and approved by the Surveyor General in June, 1867; advertised under the Act of Congress of July 1st, 1864.

This being so we insist that the plaintiffs have the oldest and only *legal* title to the premises (taking the Guadalupe patent of 1870, for the sake of argument, as lawfully issued) and should prevail in this action; it being one *purely at law*, and no equitable title was set up by the defendants, nor any proofs made to support one.

The plaintiffs' rights and *legal title* to the demanded premises we submit was finally *fixed* in

1861, under the Act of Congress of June 14th, 1860.

The language of that Act pertinent to the matter in hand is as follows, viz:

"The plat and survey so finally determined by *publication*, order or decree as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed *had been issued by the United States.*"

U. S. Stats. at Large, vol. 12, p. 34, §5.

This having become final by *publication* and the statute declares that such a survey and plat is of like *dignity* as one *ordered into Court* and *there approved;* and that it has "the same *effect* and validity in law as if *a patent* " had been issued.

Now what is the effect of a patent? No one doubts but it conveys the legal title to all lands within its calls; this is elementary law.

As was said by this Court in

Lynch vs. Bernal, 9 Wal. 320.

"The Act of June 14th, 1860, gives to a survey and plat of land claimed under a confirmed Mexican grant, when approved by the District Court the effect and validity of a patent of the United States. It so declares in express terms."

And it so declares in *express terms* where the survey becomes final by *publication* upon lapse of time.

In the above case Bernal recovered in ejectment on his legal title without patent; the fact that the

plaintiffs in this case proved their approved plat and survey *by a patent*, cannot change the matter or lower the dignity and effect of the survey and plat. The plaintiffs' survey had the *effect* and *validity of a patent before it reached the General Land Office*, and the patent thereafter issued but gave them a more convenient record proof of their prior legal title.

This doctrine is clearly and forcibly announced in the case of

Henshaw vs. Bissel, 18 Wal. 268–9.

The plaintiffs right and legal title to the premises being thus vested in 1861, the subsequent survey and patent of the Guadalupe could not divest or impair such title or right for as was said in

Fletcher vs. Peck, 6 Cranch, 132.

A title once vested cannot be divested even by legislative power, or as said in

United States vs. Aredondo, 6 Peters, 738,

"A grant even by Act of Parliament, which conveys a title good against the King, takes away no right of property from any other, though it contains no saving clause, it passes no *other right than that of the public*, although the grant is general of the land."

Long before the Guadalupe patent issued, the *Public's title* had passed to the plaintiffs' grantors

under their survey, it having the dignity and *effect of a patent;* the *public* had *nothing to convey*, and "a patent cannot effect a prior right."

New Orleans vs. Armas, 9 Peters, 236.

This Court said in

Rice vs. The Rail Road, 1 Black, 375:

"When the State has no title to the thing granted, the patent is void."

The plaintiffs survey under the Act of 1860 had in 1861 passed all the title of the United States to the plaintiffs' grantors which was long before this second Guadalupe survey was made, or patent issued on it.

Harold et al vs. Simonds et al, 9 Mo. 330.

Our position is

1st—That the approved and published survey and plats of the Laguna grant had by express Statute (when the publication was complete in 1861) the force, effect and validity of a patent *issued at that time.*

2nd—That the force and effect of a U. S patent in such cases is to *pass out of her the legal title.*

3rd—That a second patent to the same land, (the first being uncancelled) has nothing to act on, conveys no title.

On these points we also cite

Patterson vs. Tatum, 3 Sawyer, 172.

Mr. Justice Field rendering the opinion in that case lays down the rules with such logical clearness and force that we copy therefrom. He says:

"A patent is the instrument by which the Government, whether State or National, *passes its title;* it is the Government *conveyance.* But, if the Government *possesses at the time no title, none passes* by its *execution.* It is of itself evidence of title, only because Government being the original source of title, the presumption of law is that the title remained with the Government until some other disposition of it is shown. But *if an earlier patent is produced* the *subsequent* one *ceases* to have any *operation.* The *title passing* by the *first* conveyance *is not affected* by the *second until the first* is *got out of the way.*"

See also in this connection

U. S. vs. Stone, 2 Wal., 535.

Moore vs. Robbins, 96 U. S., 530.

No attempt was made to question the plaintiffs' patent or any of its recitals, and if there had been it could not have been done in this form of action; that is a matter for the Government. Moreover, "A patent implies compliance with all the law necessary to its issuance."

Yount vs. Howell, 14 Cal, 469.

Doll vs. Meador, 16 Cal., 327.

We showed the first patent and the defendants at best but a junior one; and ours had not been "got out of the way."

The President and land officers of the United

States had no power over our approved and final survey under the Act of 1860; they could not set it aside or impair its validity, by issuing a patent to another for a part of the land embraced in it; Congress placed that power in other hands.

Opinions of the Attorney General, Vol. 12, pp. 116–7, and pp. 251–4.

Henshaw vs. Bissel, 18 Wal, 268–9.

We therefore respectfully submit that considering the case presented by the Laguna patent and upon the theory that the second patent of the Guadalupe was lawfully issued, and leaving entirely out of view the first survey and patent of the Guadalupe, that the law is with the plaintiffs and the Court below erred in not giving them judgment.

IV.

The patent of the Guadalupe Rancho issued June 30th, 1866, under the survey made in 1860, was and is a valid patent; and the only one the Land Officers had any authority to issue; when that was done the transaction was closed. This patent did not include the demanded premises.

All that has been said in regard to the Laguna patent applies here, and need not be again repeated; but if some repetition be found we hope the importance of the questions may excuse us.

The survey embraced in this patent and on which it was issued, had the effect and validity of a patent, and was unquestioned for *five years before* it was forwarded to the Commissioner of the General Land Office, and the Commissioner to whom it was forwarded and whose action was final on it, never did question it.

It imports verity and its recitals cannot be questioned in an action at law. The Congress of the United States having sole power in the premises, and being charged with the duty of segregating the private from the public lands, under the obligations of the law of nations and the treaty of Guadalupe, passed the Act of June 14, 1860, already cited and referred to.

By that Act the Surveyor General of the United States for California was *clothed* with a *special* and *exclusive power* of making the surveys of Spanish and Mexican grants and of *approving* and *publishing* them; *to his judgment* were the questions of *survey*, *approval*, and *due publication submitted* with no power in any Court or tribunal to review his action, nor could his survey be impeached save in one way, by objections filed and ordered into Court. A survey made, approved and published under that Act (where not ordered into Court), and the official certificate of the Surveror General to its being so done, is within the protection of the salutary principles laid down

with great force and clearness by Justices Field Sawyer and Hoffman in

U. S. vs. Flint et al, 4 Sawyer 42.

Proceedings of this sort are proceedings *in rem* and *bind all the world.*

Grisar vs. McDowell, 6 Wal. 379.

That patent at *least* took effect from its issuance, and needed no delivery or acceptance.

Marbury vs. Madison, 1 Cranch, 159–160.

The Supreme Court of California had occasion to examine and pass on the questions here involved in

Chipley vs. Farris, 45 Cal. 539.

We quote from the opinion:

"A patent, issued under the Act of 1851, is, as has often been held by this Court, the final act in proceedings instituted for the confirmation of the claim of the patentee to lands which had been granted by the former Government, and for the segregation of such land from the public lands of the United States; and it is a record which binds both the Government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose (Leese vs. Clark, 18 Cal., 535). While it stands, the claimant or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. Such being the nature and effect of the patent, the evidence offered by the plaintiffs to prove the patent was void was properly excluded.

"It is unnecessary, in order to give effect to a patent, to show an acceptance of it by the patentee. The general rule is that a patent takes effect upon its being issued, and it is unnecessary to show a delivery or an acceptance of it by the patentee; and whatever may be the rule in the case of public lands which are exposed to sale under the laws of the United States, as to the power of the Government to vest title in a person against his will, it would seem to admit of no doubt that in a proceeding under the Act of 1851 the claimant is as powerless to prevent the patent from issuing and taking effect, if the proceedings have not been dismissed, as he is to prevent the rendition of a decree determining the question of the validity of the claim. When a private person files his petition for a confirmation, the patent, if the claim is confirmed, is a necessary step in the proceedings, and the assent of the claimant, or those claiming under him, is no more essential to its validity or effect, than any other step in the proceedings."

There were five eminent men on the bench at that time; none dissented, and we submit that leaving out of view the weight of the names of the eminent jurists who pronounced this opinion, that the logic of the opinion gives it great weight.

See to this point also

Miller vs. Ellis, 51 Cal., 74.

Following the same line of reasoning adopted in Chipley vs. Farris Supra, it has been holden that even those who held perfect Mexican grants if they submitted them to the tribunals of the United States for settlement under the Acts of

Congress and they are confirmed, surveyed and patented, such decree, survey and patent are conclusive as to the extent of the grants, and cannot be questioned.

Boyle vs Hinds, 2 Sawyer, 527.

Cassidy vs. Carr, 48 Cal., 345.

The Supreme Court of California considered and passed on another case that disposes of the question of acceptance. The right to question the patent of 1866 in regard to notice and publication of the survey and the power to issue, and the validity of a second patent for the same confirmation, we refer to

Cruz vs. Martinez, 53 Cal., 239.

This was a contest in an action of ejectment between two patents from the United States to the city of Los Angeles for Pueblo lands. August 9th, 1866, a document purporting to be a patent of the United States to the city for her lands was made out in due form but was silent as to the publication of the survey; it was properly signed, sealed and recorded, but never sent out from the General Land Office, (viz: delivered.)

Subsequently the United States Surveyor General for California was instructed to make the publication of survey. This he did in 1873, and upon receipt of his certificate, and on the 4th of August, 1875, a second patent for the same land

in due form, properly signed, sealed and recorded, reciting the publication was issued.

In the action the plaintiff claimed under the patent of 1875, and the defendant relied on the Statutes of Limitations, claimed that the patent of 1866 was the only valid patent, and that the power to patent was exhausted by the issuance of that patent. The plaintiff sought to impeach the patent of 1866 for want of publication of survey. The Court below rejected the testimony, holding that the patent was valid on its face, and could not be thus impeached, the plaintiff appealed.

The Supreme Court in passing on the case say:

"The patent to the city of Los Angeles bearing date the 9th day of August 1866 having been duly signed and recorded in the proper book in the General Land Office, vested in the city the legal title to the lands therein described."

"The plaintiff who claims under the city for the purpose of showing that the patent is void, (patent of 1866) offered to prove that the survey therein recited *had not been published* as required by law, but it was excluded by the Court. The patent is regular on its face. It is not required to recite that the survey had been published; and assuming that the law required a publication of the survey, it will be presumed in support of the patent that the proper officers of the Land Department determined prior to the *signature of the patent that due publication of the survey had been made.* The question whether they erred in such determination is not open to inquiry in this action. Upon that the patent is conclusive upon the city, and also upon the plaintiff claiming under her."

This is to the point; the reasoning seems to be sound and unanswerable, and the authority is of great weight, and must determine this case in our favor or be overthrown.

This Court in a recent case holds the same doctrine.

French vs. Fyan 93 U. S., 169.

It was urged in the Court below that John B. Ward, the sole owner of the Guadalupe Rancho in 1866, upon receiving notice of the issuance of that patent promptly rejected it, refused its acceptance; and demanded a new survey. That this gave the Commissioner power to recall and cancel it, and to order a new survey and to issue another and valid patent for said Rancho. That the Commissioner's recall of such patent amounted to a cancellation thereof; and the Court below sustained that view. We think the points and authorities already presented overthrow these positions, but we have other points and authorities equally fatal thereto.

John B. Ward was neither grantee, confirmee nor patentee of this grant, nor of any part of it; and had no right we submit, to either accept or reject the patent. But Diego Olivera and Teodoro Arellanes were the grantees, confirmees and patentees of it, and the whole of it, and there was no refusal on their part of the survey or pat-

ent shown or found, and the presumption of law is that they accepted it.

The land officers could not deal with Mr. Ward; they had no *judicial* power to determine *his interest* in the grant; he did not present it for confirmation, and was a stranger to the entire record, while Olivera and Arellanes had presented it and asked for a patent in advance, which is in law a good acceptance under the authorities already presented.

Those who purchased of the grantees and confirmees, (and those claiming under them) while the matter was in *fieri*, took the title subject to the action of the Government and said confirmees, and acquired no right or power to dictate to, or control either; if the confirmees accepted a patent for less land than they sold, the purchasers had the right of rescission, or of an action for damages, and nothing more.

The legal title to this rancho must pass to the grantees and confirmees before it can reach their vendees, and it could only pass by an issuance to them of the patent or its equivalent.

Of what avail then was Ward's refusal to accept this patent?

But suppose for the sake of the argument, we concede that Ward could and did reject the patent and refuse to accept it, *what of it?* It was the *survey of* 1860, approval and publication and plat

in 1861 that fixed the location of the grant, closed the transaction and passed the legal title; it had the force, effect and validity of a patent as we have seen. This took *place long before* Ward ever had any interest in *the grant*. Only those interested in the grant at the time of the survey and publication could object to it, this they never did, but accepted it and conveyed by it. Ward himself accepted a deed by that survey, referring to it, and he is bound by the recitals of the deed under which he claims.

Bank vs. Risley, 4 Denio, 486.

See the statement of facts herein or the findings.

Transcript folios 60 to 65.

This we submit was a good acceptance if any were needed.

But the Commissioner's recall of the first patent *was no cancellation*, it was simply the removal of the document, (so to speak) from one pigeon-hole to another. The Commissioner, moreover, had no such power. The President of the United States and officers of the Land Department must find authority for all their acts in laws of Congress, before they have any binding effect; they have no power unless found in an Act of Congress. A patent issued without authority is void, and may be shown so in an action of ejectment.

Stoddard vs. Chambers, 2 Howard, 317-8.

Patterson vs. Winn, 11 Wheaton, 384.

The recall of the first patent and issuance of the second finds no support in the laws of Congress; and those acts are therefore void.

Again one administration or executive officer thereof cannot undo what a former has done.

Godfrey vs. Beardsley, 2 McLean, 412.

The case was: President Jackson tried to revoke a permit given an Indian by President Adams to sell land; it was held he could not do it.

In this case President Johnson and the Commissioner and officers of his administration issued the first Guadalupe patent, and afterwards President Grant and his executive officers on an ex-parte showing, tried to undo it by recalling this patent and issuing a second one. How could the Commissioner, (even of the same Administration) undo the act of the head of the Department; the President causes the letters to be made patent and the seal to be attached. The *United States issues the patent* by her officers, not *the Commissioner*.

Four officers act in issuing such a patent, viz: The Surveyor General, the Commissioner of the General Land Office, the Recorder thereof and the President. Can *one* of them revoke it?

J. M. Edmonds, Commissioner under President Johnson, prepared and issued the first Guadalupe patent and sent it out to California; after he went

out of office, his successor, J. S. Wilson, Commissioner under President Grant's Administration, tried to recall it and issue a new and different one in its stead.

See Statement of Facts herein, or Transcript folios 41, 54 and 81.

This could not be done; that is well settled.

Opinions of Att'ys General Wm. Wirt, vol. 2, p. 9.

Isaac Toucey, vol. 5, p. 29.

Reverdy Johnson, vol. 5, p. 123.

J. S. Black, vol. 9, p. 301.

H. Stanbury, vol. 12, p. 358.

E. R. Hoar, vol. 13, p. 227.

U. S. vs. Stone, 2 Wal., 535.

The first patent of the Guadalupe issued in 1866 is not only the Government's deed; but a solemn and formal record of the conclusion of the proceedings of the tribunals of the United States created and clothed with special and extraordinary powers in the premises, made in due form under the seal of the General Land Office.

It is uncancelled and unimpeached, save that *a Commissioner* of the General Land Office who had no part or lot in its execution upon an *ex parte showing*, of one who was a stranger to the proceedings culminating in its issuance, had it *re-*

turned to Washington for *a season*. Can it be thus impeached, its recitals questioned, its validity overthrown and a new one for different land issued in its place; and all without judicial inquiry or the sanction of an Act of Congress? We are firmly persuaded it can not. The first patent uncancelled since its return to California has, as we have shown in the statement of facts, been accepted and filed for record by parties deriving title under the grantees, confirmees and patentees.

We therefore submit that the Court below erred in not holding the Guadalupe patent of 1866, to be the only valid or binding patent to said Rancho.

V.

The second patent of the Guadalupe issued March 1st, 1870, under which the defendants' claim is void.

Where a patent is issued against or without authority of law it is void and may be shown so in an action of ejectment.

Sherman vs. Buick, 93 U. S., 209.

This point has been sufficiently established in and by the argument and authorities already presented. We add but two suggestions:

1st—If delivery be essential to the validity of

a patent, then this patent is void, it has never been delivered.

See Statement of Facts.

2nd—If not void in toto it is as to the demanded premises, as the prior survey of the Laguna (approved and rendered final by publication) *reserved* that land from patenting to the Guadalupe claimants, and a patent to reserved land is void.

Newhall vs. Sawyer, 92 U. S. 761 and 766.

The Court therefore erred in holding this patent valid as to the demanded premises.

VI.

It was claimed by the defendants below (and may be urged here,) that the judgment of the U. S. Circuit Court in Leroy vs. Jamison estopped the plaintiffs in this action from questioning Leroy's title. We do not understand that the lower Court gave this matter any weight, but in order that the whole controversy might come up on a writ of error, a finding was made thereon.

Statement of Facts p. or Transcript, folios 82–3 and 4.

We submit there is nothing in the point for several reasons;

1st—The plaintiffs were never in any way parties to that *record*; they merely gave the aid of

money and counsel to the defendants in that action, (it being one of ejectment,) and are therefore not estopped by it. This is too plain for serious argument; even had they been the landlords of the defendants they would not have been bound.

Altschul vs. Polack, Pacific Coast Law Journal, Vol. 5, pp. 136.

The defendants in that action would be estopped by it if insisted on in a proper way. But *if they* were estopped by it that could in no way affect their co-tenants; the estoppal of one tenant in common in no way affects his co-tenants.

Williams vs. Sutton, 43 Cal., 71.

2nd—There was no pleading of the estoppel by the defendants, and under our practice the party must plead everything that he desires to prove or use as a defence.

Greene vs. Palmer, 15 Cal. 415.

And matters of this sort must be specially plead.

Davis vs. Perly, 30 Cal. 630.

3rd—But had it been well pleaded and well supported by proof, still it would be of no avail to the defendants in this case as they set it at large by introducing other proof of title (viz. the second Guadalupe patent and derived title under it which ante-dated this judgment) they could not rely on an estoppel and also an other proof of title. The

rule is well stated by the Supreme Court of California as follows, viz:

"A party cannot rely upon a judicial determination of an issue by way of an estoppel, and also upon proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined; and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter he cannot complain that the other party pursues it without regard to the estoppel."

Megerle vs. Ashe, 33 Cal., 84.

VII.

In this case it is shown that the plaintiffs are tenants in common with others in the Laguna Rancho, and own an undivided interest to the extent of one-sixth of the whole grant.

Statement of Facts, p. or Transcript, folio 81.

This entitled them to recover the whole property as against the defendants who are strangers to the title.

Stark vs. Barret, 15 Cal., 371.
Touchard vs. Crow, 20 Cal., 150.
Hart vs. Robinson, 21 Cal., 346.
Mahoney vs. Vanwinkle, 21 Cal., 55.
Williams vs. Sutton, 43 Cal., 65.
Hardy vs. Johnson, 1 Wal., 371.

They upon recovery, however, would only be entitled to their *pro rata* of the rents and profits, viz: one-sixth as found by the Court.

Clark vs. Huber, 20 Cal., 196.

Muller vs. Boggs, 25 Cal., 175.

VIII.

It was claimed in the Court below, and will doubtless be urged here that the Guadalupe patent of 1870 had been twice before the United States Circuit Court for the District of California, and in both cases upheld, and that these decisions must be overthrown before the plaintiffs can recover. We refer to the cases of

Leroy vs. Clayton, 2 Sawyer, 493, and

Leroy vs. Jamison, 3 Sawyer, 369.

We propose in a measure to review these cases. In neither of them were the real questions fairly presented to the Court as they are shown in this record. And we insist that the legal principles laid down in said cases when applied to the facts presented in the case at bar entitle the plaintiffs in error to a reversal and judgment in their favor.

In Leroy vs. Clayton the contest was between mere squatters claiming under the laws of the United States and Leroy claiming under the second Guadalupe patent; the Laguna patent *was*

not then issued, and no one claiming under it on that grant was before the Court, and the first Guadalupe patent was then in the hands of the Surveyor General.

The *various deeds* made by the Guadalupe grant owners conveying the grant by the survey under the Act of 1860, were not introduced or called to the attention of the Court.

Nor was it shown that the Commissioner who *recalled* and *attempted* to set aside the first Guadalupe *patent* was the successor of the Commissioner who issued it; that he *belonged* to a *new* and *succeeding* Administration. This question was not presented to or considered by the Court in that case.

The first point therein decided was that a patent did not need delivery or acceptance.

Page 496.

The Court then proceeds to discuss the remaining question in that case, which the learned Judge who rendered that opinion concedes to be a difficult one, viz: As to the power of the Commissioner to recall the first patent after it was issued; but as we have just seen it was not called to his attention that the Commissioner who issued the patent was not the one who recalled it. The opinion is based almost exclusively on the case of Maguire vs. Tyler which was twice before the U. S. Supreme Court. By turning to that case it

will be found to have been decided while the Act of Congress of July 4th, 1836 was in force that *gave* the *Commissioner* of the General Land Office a *general supervision of surveys*.

Maguire vs. Tyler, 1 Black, 207.
Maguire vs. Tyler, 8 Wallace, 664.

The Court's attention does not seem to have been called to the fact that the Act of June 14th, 1860, in express terms repealed the Act of 1836, relied on in Maguire against Tyler, and all other Acts giving the Commissioner power over surveys; and vested these matters in other hands. See authorities already cited on that point, and

U. S. Stats. at Large, Vol. 12, pp. 34, §9.

Every position taken by the Judge in that case may stand, and yet on the facts as presented by this record the plaintiffs in error be clearly entitled to a judgment.

We by no means, however, agree with the dicision in that case; we think it at war with sound principle and the current of authority as already presented in this argument.

If we examine the case of Leroy vs. Jamison in 3d Sawyer, we find that it was a very different one from the case at bar; and that applying the principles of law of that case, to the facts presented in this record entitles the plaintiffs in error to a reversal. It is reported in 3d Sawyer, commenc-

ing at page 369. We shall in quoting from the case and in referring to it hereafter give only the page without repeating the name of the case or report.

That was also an action of ejectment and all *three of the patents* were before the Court, the first Guadalupe patent being produced in Court by the U. S. Surveyor General for California; but in that case (in which it differs from this) *both grants were produced from* the Spanish archives, and also both *acts* of *juridicial possession* from the same source; and *parole testimony* was produced by the respective parties to show where the *lines and monuments of these grants* were on the ground, and what lands *were included* within the calls of the respective grants, and acts of juridicial possession, *nothing of that kind was done* in this case. In that case it was not shown as in this that the owners of the grant *had conveyed* by the *survey* and plat of 1860.

Keeping these points in view, and noticing some others as we proceed, we call further attention to that case :

Justice Field in rendering the opinion of the Court, after stating that prior to June 14th, 1860, the Commissioner of the General Land Office had supervision and control of surveys of this sort, says :

"But by the Act of 1860, and so long as that Act was in force, his power in this respect was

withdrawn. That Act established a system by which all surveys when made pursuant to its requirements and advertised in a certain way, became so far final as to leave to the Commissioner the simple ministerial duty of issuing a patent thereon."

To this doctrine we subscribe. The first Guadalupe survey was made, approved and advertised under that Act in 1860 and 1861, and the Surveyor General to whom it was intrusted did his duty and made the proper certificates of it under his hand and official seal; and *the Statute made* no provision for an appeal from or review of his acts. The Commissioner by the Statute upon receiving the certificate had the simple duty to perform of preparing and issuing the patent, and this he did. The *legal title had passed before.* The patent was, but more convenient proof of it that could be properly recorded and preserved in the archives of the Nation. True Justice Field, while he recognizes these Statutory provisions, says:

"There was still a duty resting upon that officer to render the survey final, when not subjected to the judgment of the District Court, (which acquired jurisdiction by a return to it of the survey) it was necessary under the Act as already seen, that the publication required should be made. This was an essential prerequisite to its finality; nothing else could be substituted for it. And though in issuing a patent upon a survey when final, the Commissioner had a mere ministerial duty to perform, there was this preliminary duty

cast upon him to see that the necessary publication had been made. The certificate of the Surveyor General was evidence of this fact, but it was only *prima facie* evidence. Unquestioned, it might be taken as conclusive; when questioned, the Commissioner could go behind it."

Page 386.

To this we do not agree. Where did the Commissioner derive the power from, we respectfully ask? The Court did not say, and it is not to be found in the Statute. Again, the survey and certificate had when this patent was issued remained unquestioned for over five years, and many conveyances had been made by it. The Commissioner who *passed on the question*, (if power was lodged in him,) *did not question* it or attempt to go behind the Surveyor General's certificate. *J. M. Edmonds* issued that patent, *but it was his successor*, J. S. Wilson, who undertook the work of destruction. That matter was not brought to the attention of the Court in the case we are considering, and had it been, and the authorities we have cited produced, we have no doubt but a different conclusion would have been arrived it. This is apparent from what Justice Field says further on in the same opinion. His language is:

"As we have already stated it was the duty of the Commissioner upon receiving a survey transmitted to him as published under the Act of 1860, to examine into the regularity and sufficiency of the alleged publication. *That was a matter sub-*

mitted by the law to *his determination*, and that *determination whether correctly or erroneously made* was *conclusive*, unless *reviewed* and *corrected* on *appeal* by *his superior* the Secretary of the Interior. The Commissioner has undoubtedly a right *within a reasonable period* upon proper application to *reconsider* any matter *previously determined* by him, but such right must *be exercised before proceedings* upon the original ruling have been taken and concluded."

Page 389.

Now in this case there is no pretense that any appeal was taken from the action of the Commissioner *who issued* the first Guadalupe patent to the Secretary of the Interior and the record shows that *he never attempted to reconsider* his action within a *reasonable period*, but it was *his successor* in office after the patent *had gone from* the control of the Land Office *who undertook the business.*

This we submit is not within the rule laid down supra.

The learned Justice after laying down the doctrine that a patentee may refuse to accept a grant, goes on to say that the refusal must be promptly made, and if not so done, says:

"Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue his refusal to accept it is *explicitly* declared, and such refusal is communicated to the Land Office."

Page 391.

Now as we have seen, the finally approved survey upon expiration of publication has the *effect* in law of a patent. This occurred as shown by this record in 1861; and Ward had full notice as early as 1864, for his deed recited it; what it was, and where found. Yet he does no act to refuse an acceptance until late in 1866, some two years after full knowledge and notice. This we submit is too late, and he is bound; and his grantors were bound before him, as we have already shown from the record.

One more matter and we have done with this case.

We come now to the real point on which that case turned, the one on which the judgment was pronounced in favor of the plaintiff. The Court after pronouncing the Guadalupe patent of 1870 valid, also holds the Laguna patent valid and effective; the Justice then proceeds as follows to determine the cause, and says:

"We have then the case of two patents regularly issued, each embracing the land in controversy. We must therefore *look behind them* to the *original grants* to ascertain which of them carried the better right to the premises. As already said, they adjoin each other; the eastern line of one is the western line of the other. If we can find this line the difficulty is of course solved. The grant of the Guadalupe Rancho only designates generally the location of the land, without giving any specific boundaries; but in April, 1840, which was the month following its issue, possession was offi-

cially delivered to the grantee by the magistrate of the vicinage, a proceeding necessary under the law of Mexico to a complete investiture of title, and called in the language of the country, juridical possession. This proceeding involved a measurement of the land and its segregation from the public domain. A record of the proceedings showing the measurement and the boundaries established, was made and a copy *is produced in evidence.*

The grant of the Rancho La Punta de la Laguna describes the land granted as bounded by various designated ranchos. In January, 1845, juridicial possession of these premises was also given to the parties by a magistrate of the vicinage. A record of this proceeding was also preserved, *and a copy is in evidence.* These records were before the Land Commissioner, and the United States District Court when the grants were confirmed and in the decrees of confirmation the boundaries there given are followed. If we now look at the decree in the case of the rancho of La Punta de la Laguna we find the *dividing* line between it and the Rancho Guadalupe thus described: 'Commencing on the top of the Lomas de la Larga and running northerly over the plain, crossing the middle of the Laguna, the distance of ten thousand two hundred varas to the Cuchillo de Nepomi, where two road ascend, and where a stake was driven as a boundary.' The different objects here stated have all been identified. The position of the Lomas de la Larga is admitted to be at a live oak marked on the survey; the laguna of course lies where it always did; and the point where the stake mentioned was driven has been shown. The line thus given is the one laid down in the new survey of the Guadalupe Rancho upon which the patent of 1870 was issued. We are satisfied that it is the true line. It would serve no useful pur-

pose to go minutely into an examination of the evidence presented against this view. It is sufficient to observe that it has not created any serious doubt in our minds as to the correctness of this line. This *conclusion disposes* of the *question* of conflict of boundaries." (Page 395-6).

It is clear therefore that the *plaintiff recovered* in that case *not by virtue of his elder grant* or *patent* but by introducing proof documentary and oral, dehors the patent (by going behind it as it is called) and making a showing not made or attempted in this case, viz: That plaintiff's ~~patent~~ grant covered totally different land. That was a case of a junior patentee recovering on that sort of a showing; as our patent though *issued* last, really first appropriated the legal title to the land.

It was insisted in the Court below that as the defendants claim under the elder grant, they (if their patent is valid) must win. We think not. Seniority of grant *standing alone* is of no value, as there is no pretense that our grant is a junior grant of land inside the exterior boundary of the other, the question is one of location purely. The grants apply to different tracts. The question is, was the Guadalupe grant legally and properly located on the land we claim so as to appropriate the legal title to it before our location and patent.

IX.

There is another point fatal to the judgment in

this case which we incidentally noticed in the Statement of Facts.

The complaint was under the California Code of Civil Procedure verified.

Statement of Facts, p. or Transcript, folio, 4.

In actions of this sort the California Code of Practice governs.

Desty's Federal Procedure, §914.

This being so, it required the defendants to *specifically* deny every allegation *they proposed to controvert.*

Code of Civil Procedure, §437.

And "every material allegation of the complaint not controverted by the answer must for the *purposes* of the *action* be taken as true."

Code of Civil Procedure, §462.

De Rea vs. Condes, 4 Cal., 119–120.

Thompson vs. Lee, 8 Cal., 280.

Powell vs. Oullahan, 14 Cal., 116.

The plaintiffs in their complaint duly verified as we have seen, alleged that they were on the first day of June, 1877, the owners and ever since had been, and then were the owners of the demanded premises, describing them.

Transcript, folio 2.

This allegation of ownership was not only not

specifically denied, but not denied at all. The language used is :

"They deny that on the first day of June, 1877, the said plaintiffs, or at any time since, have been or now are the owners or entitled to the possession *of all* that certain piece, parcel or tract of land described," &c.

This is an admission of the ownership of the demanded premises.

The answer did deny the ouster and also the withholding. So the answer was a good one, and the plaintiffs were compelled to go to trial. When the Court found for the plaintiffs as to the ouster and detention, which it did, all the issues were determined in their favor, and the conclusions of law and judgment should have been with the plaintiffs. They were entitled to a judgment on the findings, and the Court erred in not giving it to them. We have been handed a brief on behalf of the defendants in error that seems to have been prepared for some other case and issue, and to have merely been chopped off at each end and filed in this case. It really discusses no point raised by us in this case save one, and as to that it sustains our position, and is in fact a *felo de se*.

It is wholly directed to the proposition that a Commissioner of the General Land Office has no power or authority to recall or cancel a patent and so say we. The brief looks to his being powerless to recall or cancel the second Guadalupe patent

while we insist he had no power to recall or cancel the first one, and that when he issued the first one his power was exhausted and that the second one so-called is void; a worthless piece of paper.

We therefore respectfully submit that the plaintiffs in error are entitled to a reversal and to an order directing the Court below to enter a judgment in their favor for the possession of the demanded premises and for damages and costs.

S. F. LEIB,

Counsel for Plaintiffs in Error No. 266.

SUPREME COURT
FILED
MAR 30 1881
JAMES H. MCKENNEY, Clerk

In Supreme Court of the United States.

William Adam et al., *Plaintiffs in Error,* *vs.* J. R. Norris et al., *Defendants in Error.*	October Term, 1880. No. 266.

In Error to the Circuit Court of the United States for the District of California.

Brief for the Defendants in Error.

BENJAMIN S. BROOKS,
JAMES K. REDINGTON,
of Counsel.

In the Supreme Court of the United States.

WILLIAM ADAMS, [illegible]

Plaintiff in Error,

vs. No. 208.

J. B. NORRIS VAN DORENS, [illegible]

Defendants in Error.

In error to the [illegible] Court of the United States for the [illegible] District of [illegible].

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Fact.

The statement of facts herein contained is taken from the transcript of record [illegible] Court of the United States for the [illegible] District of [illegible], which the plaintiff in error has filed in this court.

The plaintiff's petition [illegible] issued in the above-entitled cause by the Clerk [illegible] Court, [illegible] May, 1877, and [illegible] days thereafter [illegible] the said writ [illegible] the said [illegible].

The complaint, filed July 2, 1877, alleges that, on the

1st day of June, 1877, plaintiffs were, and since had been, the owners and entitled to possession of "all that certain piece, "parcel or tract of land, situate and being partly in the "County of Santa Barbara, and partly in the County of "San Louis Obispo, in the State of California, known, "bounded and described as follows * * * * * "and being a part of the Rancho known as the Punta de "la Laguna." That defendants, June 2d, 1876, entered into, upon and took possession of the whole of said premises and ousted and ejected the plaintiffs, and continuously thereafter wrongfully withheld the possession of said premises, and the whole thereof, from plaintiffs.

The answer denies each of the allegations of the complaint, and further answering, avers that Theodore LeRoy, one of the defendants named in said complaint (the other defendants being his tenants) "is the owner of the rancho "Gaudaloupe, of which the premises described in the com- "plaint, or intended to be, form a part; that said rancho "was granted by the Republic of Mexico and confirmed "and patented by the United States to Diego Olivera and "Theodora Arellanes; that said grant and patent are "severally older than the grant and patent of the rancho "Punta de la Laguna, under which the plaintiffs claim "title."

A jury was expressly waived by stipulation of counsel, and the case was tried by the court without a jury. The court filed its findings in writing, and in conformity therewith, judgment was entered for defendants with costs. The plaintiffs thereupon sued out their writ of error, and the case comes before this court for review.

The findings of the court, folios 28 to 85 inclusive, are substantially as follows:

The said Le Roy and his co-defendants, were and since the 2d day of June, 1876, had been in possession of the de-

manded premises, the said Le Roy claiming title as owner under patent of the United States, dated March 1st, 1870, and the other defendants as his tenants.

The Mexican Nation, March 21, 1840, granted to Arellanes and Olivera the rancho "Gaudaloupe," which grant was finally confirmed to them and surveyed by the United States authorities. June 30, 1865, a patent of the United States was made out in the usual form, signed, sealed and recorded. August 2, 1866, this patent was transmitted by J. M. Edmunds, then Commissioner of the General Land Office, to the Surveyor General for California, for delivery, and its receipt was acknowledged by the Surveyor General August 27, 1866. Mr. Edmunds went out of office August 31, 1866, and was immediately, to wit, September 1, 1866, succeeded by Joseph S. Wilson, who held said office continuously thereafter until February 4, 1871.

Upon receiving notice of the making out and forwarding of said patent, John B. Ward, the then sole owner of the grant promptly refused to accept the same, on the ground that the survey upon which it was based was erroneous, not in accordance with the grant and confirmation, and that no legal notice of said survey, plat and approval of survey had been given, and that the same was therefore void. The said Ward, thereupon, presented to the Commissioner a petition together with certain affidavits and other documentary evidence, showing, as he claimed, that there had been no legal publication of the notice of survey; that no legal notice of the survey and its approval had been given, and that the survey was erroneous. Upon this showing he asked that a resurvey be made and that a patent issue upon the new and corrected survey.

October 22, 1866, Commissioner Wilson, acting upon the petition and evidence so submitted, sent a communication to the Surveyor General, in which, referring to such petition and evidence, he expressed the opinion that the survey

complained of was erroneous and instructed the Surveyor General to return the undelivered patent above referred to; to notify all parties interested that a re-survey had been applied for and fix a day for hearing; to determine the true locus of the grant as confirmed; make a new survey thereof accordingly; publish the same under the provisions of the Act of July 1, 1864, and after the expiration of the time fixed by law in which objections thereto might be filed, forward all the papers in the case, with his opinion, to the General Land Office. Upon receipt of these instructions said patent was returned by the Surveyor General to the General Land Office at Washington. Afterwards a new survey of said grant was made in accordance with the claim of said Ward, and these instructions, under the direction of the Surveyor General, and duly approved, and such further proceedings were had that, on the 1st day of March, 1870, a patent of the United States, in the usual form, was made out, in accordance with such survey, sealed with the seal of the General Land Office, signed by the President by his private Secretary thereto lawfully authorized, countersigned by the Recorder of the General Land Office and duly recorded in the records of patents in the General Land Office. After said patent had been recorded, it was forwarded by Commissioner Wilson, by mail, to the Surveyor General, to be delivered to the parties entitled, but before arriving at San Francisco, the said Commissioner, by telegraph, directed the Surveyor General to return the same to the General Land Office, which was done, and said patent has ever since remained in said office. The recalling and returning of said patent was without the knowledge or consent of said patentees or confirmees or any successor or successors thereof.

May 9, 1873, the defendant, Theodore Le Roy, then the sole owner of the Gaudaloupe grant, obtained from the Commissioner of the General Land Office, under the signa-

ture of said Commissioner and seal of his office, an exemplified copy of said patent of March 1, 1870, which was, on the 17th day of March, 1877, at request of said Le Roy, recorded in the county records of the county where the premises are situated; and upon the trial of this cause said exemplified copy was introduced in evidence by the defendants, as evidence of title of said Le Roy.

June 12, 1873, the Gaudaloupe patent of 1866, was a second time transmitted by the Commissioner to the Surveyor General for delivery, but it was not taken by Le Roy, then the sole owner of the grant, who claimed the patent of 1870, to be the valid patent, but remained, unclaimed and unaccepted by any one, in the custody of the Surveyor General, until April 1, 1877, when, without the knowledge or consent of said Le Roy, it was delivered by the Surveyor General to the agent of three persons to whom, subsequently to August 1, 1873, the title of Le Roy had passed, to small portions of the Gaudaloupe grant, which were embraced in both patents and which are no part of the lands in dispute in this action, said parties having no other interest in said Gaudaloupe grant or patent. The patent so obtained, was, at the request of one of the said parties, recorded in the county records, and upon the trial of this cause, was introduced by plaintiffs, as evidence of an acceptance of said patent by some of the successors of the original grantee.

The demanded premises, occupied by defendants, are outside of the patent of 1866, and included in the patent of 1870. The patent of 1870 includes all the land covered by the patent of 1866.

The defendant, Theodore Le Roy, is the successor in interest of the original grantees of Gaudaloupe through certain mesne conveyances referred to in the findings, folios 60 to 65 inclusive. The description of the premises conveyed in several of these mesne conveyances, is recited in the find-

ings. In some of these deeds, after describing the premises by the grant, by name, by boundaries and the confirmatory decree, a reference is also made to the survey of the same made by Terrell in 1860.

The Mexican Nation, December 29, 1844, granted to Louis Arrellanes and Eusides Miguel Ortega the rancho "La Punta de la Laguna," and the same was confirmed to them, "to the extent of six square leagues." In pursuance of such confirmation, the rancho was surveyed by the United States, said survey confirmed and a patent in the usual form was issued October 2, 1873. This patent embraces the land in controversy in this suit, the western line thereof coinciding with the eastern line of the Gaudaloupe patent of 1866. The plaintiffs by mesne conveyances have succeeded to an undivided sixth part of all the title and interest of the original grantees which vested in them by virtue of this patent.

The fact of the issuing of these three patents is found by the court and in each instance, after such finding, the court says: "Said patent, except the plat, which is omitted, is in the words and figures following, to wit." Then follow the patents in full, except the plats.

On the plat accompany the patent of 1866, were certain endorsements and certificates found in full by the court, at folios 42 and 43. The notice of the publication of the survey upon which the patent was based is recited in full at folio 65. The affidavits filed with the Commissioner by Ward, and upon which that officer acted in recalling the patent, showed that the Santa Barbara Gazette, one of the papers in which the Surveyor General certified said notice, was published, although purporting to be published at Santa Barbara, was in fact set up and printed at San Francisco and forwarded to Santa Barbara for distribution; that they usually took three or four days in reaching Santa Barbara and one witness stated he was a resident of Santa Barbara

during January and February, 1861, and a subscriber, and that the receipt of said paper at Santa Barbara was frequently delayed from one to four weeks after publication.

The recitals in the patents to Gaudaloupe and in that to La Punta de la Laguna show that the Gaudaloupe claimants have the senior grant, presentation by petition to the Board, confirmation, and patent; that the Gaudaloupe was confirmed by its name, by reference to the possession of the confirmees, by the map, and by the record of judicial possession, (folio 50), and that La Punta de la Laguna was confirmed "to the extent of six square leagues and no more," within certain exterior boundaries, (folio 69.)

On the 19th day of December, 1873, the defendant, Le Roy, (the other defendants being his tenants), filed in the Circuit Court of the United States for the District of California a bill of complaint against Tobias B. Jamison and several others, and alleged therein his title and seizen in fee to the same tract of land described in the complaint in this action; his right of possession thereof; that said defendants, Jamison *et al.* had unlawfully entered thereon, and wrongfully ousted and ejected him, and unlawfully withheld possession; and he sought to recover possession of said premises from said defendants. The said defendants answered, denying all the allegations of said complaint. The plaintiffs in this action, claiming to be the owners of an undivided interest in La Punta de la Laguna, with others, their tenants in common, in consequence of such ownership, united with the said defendants in defense of said action, in the names of said defendants. Le Roy, in said suit, alleged his seizen and claimed the right to recover by virtue thereof; and the plaintiffs in this action, William Adam and J. L. Shuman, together with their co-owners, but without becoming parties to the record by name, employed and paid counsel in said suit and defended said action for and in the names of said defendants. Thereafter

such further proceedings were had, that the case was by stipulation tried by the court without a jury, and upon such trial it was found by the court, in writing, that said Le Roy was, on the 4th day of November, 1873, seized in fee of and entitled to possession of the premises described in the complaint therein, and that defendants were in wrongful possession. Upon these findings Le Roy had judgment, and under writs in execution thereof, and not otherwise, in June, 1876, entered into and took possession of the said premises, and ousted the plaintiffs herein. The defendants in said suit, then in possession, and those who had succeeded to the possession of the others, attorned to and became tenants of said Le Roy. They are the same persons who are defendants in this suit, except said Le Roy, and they withhold possession from plaintiffs by virtue of said judgment and title of said Le Roy. The said judgment is still in full force and unreversed.

The plaintiffs herein showed no other title than that set forth in the findings; there is no motion for new trial, no bill of exceptions, and no evidence.

There is no finding that even inferentially disputes or questions the accuracy of the patent of 1870, or the survey upon which it was founded in locating on the ground the Gaudaloupe claim, as the same was granted by the Mexican Government, segregated by the judicial possession, and confirmed by the United States.

As conclusions of law (so-called), the court below found:

"1. That the plaintiffs were not seized of the premises in question nor any part thereof at the time of the commencement of this action, or at any time afterwards; and that they were not then, and they are not now, entitled to the possession thereof."

"2. That the defendant, Le Roy, at the date of the commencement of this action, was seized in fee of the premises

in question, and he has ever since continued to be seized in fee thereof; and that he and the other defendants named, as his tenants, at the date of the commencement of this action, were, and they ever since have continued to be, in the rightful and lawful possession of said premises and every part thereof.

"3. That defendants are entitled to judgment."

Brief for the Defendants in Error.

The counsel for plaintiff in error has filed eight assignments of error. Three of them are as follows:

"1st. The court below erred in holding and deciding that the plaintiffs were not seized of the premises or entitled to the possession thereof."

"6th. The court below erred in rendering a judgment in favor of the defendants on the facts found."

"7th. The court below erred in drawing conclusions of law against the plaintiffs and in favor of the defendants on the facts found."

These assignments are simply general allegations that the judgment was erroneous. They point out no specific error and they contain nothing advisory, either to the court or counsel, of the points to be presented or relied upon in argument. They are open to the criticism frequently made by the court upon insufficient assignments, and require no further notice.

The third assignment of error is as follows:

"3rd. The court below erred in awarding the defendants a judgment for costs."

If by this it is meant that no judgment should have been entered for costs because no judgment should have been

entered for defendants at all, this assignment is equally vague and insufficient. If it means that costs should not have followed a proper judgment for defendants for possession, it is only necessary for us to say that counsel in his brief has cited no authorities to sustain such a position, nor is it apparent how such a claim can be sustained, either upon principle or authority.

The four remaining assignments we propose to notice as nearly as possible in the order in which they are discussed by counsel.

Fourth Assignment.

"The court below erred in holding and deciding the so-called Gaudaloupe patent of 1870, to be of any validity as an instrument conveying title."

If we correctly understand the position of counsel upon this point, it is that by the proceedings anterior to, and by the preparation of the so-called patent of 1866, the title of the United States to the land described in it, passed to the patentee. That such proceeding and patent were in the nature of proceedings and a judgment *in rem* concluding every one; and that any subsequent action by the Land Department in the matter, even with the consent of the patentee and to correct a manifest error, was *ultra vires* and void.

We shall attempt to satisfy the court that the so-called patent of 1866 was ineffective and inoperative for any purpose, because there was no *acceptance* of the same by the party entitled to it, which is a necessary step in the proceedings passing the title; that the proceedings preceding its issue were not in fact in conformity to the requirements of the act of 1860, and were, therefore, ineffectual to settle anything; that that fact was so determined by the Land

Department, the tribunal having exclusive jurisdiction of the question, which decision is not reviewable in this court; that so determining, it became the duty of the Land Department to resurvey the grant, and that having done this and issued the patent of 1870 in regular and proper proceedings, that patent was a legal and valid conveyance of the title of the United States to the patentee.

In support of our position in this regard, we invite the attention of the court to the following considerations:

I.

The patent for the Gaudaloupe Rancho of date March 1, 1870, passed the title of the United States, and took effect without delivery.

That no delivery of the patent of the United States is necessary in order to completely pass title, has been expressly decided by this court at its present term in the case of the *United States ex rel. Thomas McBride* vs. *Carl Schurz*, Secretary of the Interior. The patent of 1870 was advisedly, and after thorough consideration of the whole case and every part of the case upon its merits, prepared, signed, sealed, recorded and transmitted by the Commissioner to the Surveyor General for delivery. There is no claim that there was any inadvertence on the part of the Commissioner or any of his employees. On the contrary, the record shows that the issue of the patent was the result of the deliberate judgment of the Commissioner, formed after full examination of the case on its merits, and that its recall was the result of some sudden determination, formed after the patent had been transmitted to the Surveyor General. According to the views of the entire court, therefore, the title of the United States passed to the patentees at the signing, sealing and recording of the patent.

II.

The Gaudaloupe Patent of* 1866 *was inoperative, because the patentee refused to accept it, and it was properly recalled with his consent.

Although a patent passes title without delivery of the record or a copy thereof to the patentee, it is essential that the grant thus made be accepted by the beneficiary. In other words, *acceptance* of the grant by the donee is necessary. A person is always presumed to have accepted that which in its nature is beneficial to him. This presumption attaches to every executed patent. But it is only a presumption, and is rebutted by proof of timely refusal to accept. So, too, acceptance may be presumed from the demand of patent, which is the basis of the proceedings in which it is issued. But obviously the latter presumption arises only when the patent issued covers the land claimed. A presumption of acceptance of one deed cannot arise from the previous demand for some other deed. A patent is the deed of the Government. To every deed the consent of the grantee, in some form, is necessary. The United States cannot, any more than an individual, compel a person to accept property without his consent and against his wishes. It may prepare a patent, and when the record thereof is completed, the presumption of acceptance arises. But, if immediately upon receiving notice thereof, the patentee refuses to accept the same, it is obvious that no title passes. The patent is then in the same condition as the deed of a private individual—ready for acceptance—beyond the control of the grantor, and subject only to the will of the grantee.

In the case of *Le Roy vs. Jamison*, (3 Sawy., 389, 390), Mr. Justice FIELD, referring to the question of acceptance, said:

"It becomes important, therefore, to determine when a patent of the United States for land takes effect, that is, when it becomes operative as a conveyance and binding upon both parties; and under what circumstances it may be recalled after it has passed under the seal of the United States and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing between acts which bind the Government, and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that when the Government is bound, the patentee is bound also, without reference to his assent on the subject; but nothing is farther from the fact No one can be compelled by the Government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the Government, like the deed of a private person, may take effect as a conveyance so as to bind the party to whom it is executed and transfer the title to him, it is essential that it should be accepted."

And the same doctrine is stated at length in the opinion of Judge Sawyer, in *Le Roy* vs. *Clayton*, 2 Sawy., 496.

There is more reason for holding, in regard to patents of this character, that the grantee has the right of rejection than in grants merely gratuitous. If a person has purchased a piece of land of the Government, and a patent is made out and sent to him for only a part, surely he would not be bound to accept it. The grantees of the Guadaloupe *owned it*. They had received from the former sovereign a grant of it, and juridical possession had been delivered, which was the last act of complete investiture—the livery of seizen. The title was absolute. The Government was bound by the treaty and by the law of nations to respect

it. The grantees had complied with the requirements of the new sovereign. They had presented their title with the evidence in support of it. The Board and the District Court had examined the title and had adjudicated not only the fact of the grant, but the juridical possession; had declared that it was a grant of the whole tract, and confirmed it by its title and by reference to the record and map of juridical possession. The government officers were under the law bound to give them a patent for that land and the whole of it. The owner was not bound to accept a patent for any less. Through error they made out a patent for less than the whole. The owner promptly declined to receive it, and the Land Department recalled it. They heard the complaint of the owner, decided that it was well founded; that the first survey was erroneous; that the proceedings were irregular; ordered a new survey, which was made, approved by the Surveyor-General and by the Commissioner of the General Land Office and by the owner, and, as the law required, a patent was made out, signed by the President, recorded in the Land Office, countersigned by the Recorder, sealed, and sent out for delivery. It was accepted by the patentee, and the patent demanded by him. The title thus became perfect.

The grantee does not voluntarily submit himself to the jurisdiction of the Board. This Government having assumed the duty of protecting the inhabitants of the ceded territory in their possessions, passed the act of March 3, 1851, to *ascertain* and *settle* private land claims in California. It cannot be said that the Government had not the right to ascertain and settle these claims. To carry out this purpose it commanded that *all* claims should be presented, whether legal and perfect, or equitable and inchoate. It imposed the penalty for non-compliance, that the Government would treat all lands to which no claim was presented, or to which the claim was rejected, as public do-

main. The Government, in discharge of its duty, had the right to ascertain these claims, to perfect those which were imperfect, and separate them from the public domain.

But it does not follow from this, that the Government has the right to deprive the claimant of his property. The Government has the right to *ascertain*, that is to render certain and to *settle*, that is to place beyond question all these claims. If the claim is inchoate our government will perfect it. If it is for a quantity, it will, with justice, measure off the quantity within the prescribed limits and if it is a perfect title the Government will so declare, and give to each one a muniment of title in shape of a patent which will *ascertain* and *settle* the title. If the claim is of a legal grant and a juridicial possession, the Board may enquire and determine whether the legal grant was in fact made so as to authorize a juridicial possession, and may enquire if juridical possession was in fact delivered by an officer duly authorized, and in conformity with the grant. But when the tribunal has decided that the grant was duly made, as in this case, to a certain piece of land, and to the whole thereof without limit of quantity and that juridical possession was duly delivered in accordance therewith and confirmed to him *that* land, the claimant becomes entitled *to a patent for the whole tract*, and if the Government offers him a patent for less than the whole, he has a right to reject it.

This done, the United States is at liberty to recall the rejected paper. The question is one solely between the Government and the claimant. By the consent of both parties the case can be re-examined and the record corrected by a new patent. That is what was done in this case. The patentee refused to accept the patent of 1866, and upon his petition and request the whole case was again examined upon its merits. The Commissioner, so examining decided that the prior action of the office was erroneous,

that the claimant was right and accordingly issued a new patent, giving him the land determined to be his under the confirmation.

The power of the Land Department to recall a patent with the consent of the real party in interest and to issue a new one in conformity to law, has been several times sustained by this Court.

Bell vs. *Herne*, 19 How., 262;
Doswell vs. *De La Lanza*, 20 How., 29;
Maguire vs. *Tyler*, 1 Black, 199,
and 8 Wall, 655—663.

The object of the Act of June, 1860, is to locate and set off to the confirmee the *quantity* to which he is entitled, and the act has an ample field of operation without construing it as a means of divesting a title which the Government itself has solemnly adjudged to exist, and to antedate its own title. Nor does that act contemplate that the Government shall make the locations. Its obvious intent is that the *claimant* himself should point out the location and have the lines established on the ground by a sworn deputy of the U. S. Surveyor, and returned to his office.

He is the claimant and actor. The Surveyor General is to cause his claim to be surveyed. When he has thus filed his *claim*, the Government and third parties may object. The law contains no provisions for the *claimant* to interpose objections. It only allows persons claiming land *within the survey* to object. Of course that cannot mean the claimant himself. The return is to be made on application of some party whom the court allows to intervene.

The decree of the court upon hearing, or a publication without intervention adds nothing to the grantee's title or his interest. The effect is simply to *segregate*, to *locate* his claim. That location by the express language of the act is equivalent to a patent. It is nothing more.

The patent in any case is a judgment. It is an every day matter for Courts to set aside their judgments taken by default upon application of the party aggrieved, and good cause shown, and thereafter to proceed to trial and to final judgment.

Was it ever claimed that when such final judgment was offered in evidence it could be impeached by showing the *first* judgment and the court be called upon to enquire into the sufficiency of the evidence upon which the default judgment was set aside?

The counsel for plaintiff, at page 26 of his brief, asserts the novel doctrine that under the Act of 1860 the *Surveyor General* was clothed with *exclusive* jurisdiction to make surveys and decide finally, without appeal or supervision, all questions relative to their *approval* and *publication*. Such a position cannot be maintained for a moment. The Act of July 4, 1836, expressly conferred the power of supervision upon the Commissioner, in all matters of this and a similar character. The Act of 1860 did not attempt to do anything more than to remove from the Land Department to the courts the jurisdiction to segregate these grants. When a decree of court fixed the locus of a claim, or publication of a survey had been made *in a particular specified way*, the law directed the Commissioner to issue a patent for the land. But he was obviously not to do this upon *every kind* of a publication, whether made in conformity to the requirements of the act or not. The law necessarily gave him jurisdiction to *ascertain whether a publication had been made in conformity to the Act*. The Act was one of all others to be strictly construed. By it property rights might be divested upon published statutory notice. A literal compliance with its provisions was necessary in order to create any rights as the result of proceedings under it. A defective publication was no publi-

cation at all. And when the Commissioner was charged with the duty of executing the act, or parts of it, and commanded to issue a patent under certain conditions, he was necessarily clothed with quasi judicial power to determine whether those conditions existed.

Le Roy vs. *Jamison*, 3 Sawy., 369.

And so far as we are advised this power has never been seriously questioned from the date of the act to the present time, but has been the settled rule of jurisdiction in the Land Department in every case arising under its provisions.

The question as to the regularity of the publication of the survey was therefore a question necessarily to be determined by the Commissioner before issuance of the patent. In exercising the jurisdiction thus given him by law, the Commissioner committed an error, but while the transaction was *in fieri*, before the patent either in fact or presumptively had been accepted, the error was discovered, the patentee refused to accept the same; it was with this consent recalled, the whole question re-examined, the former error decided to be an error, a new survey made, proper proceedings taken and another patent issued.

The patent of 1866 was recalled upon the petition of the patentee for alleged errors in its issue, which were, first, that a proper publication had not been made of the survey upon which it was based, as required by the Act of June 14, 1860; second, that the survey and patent did not include the premises confirmed. The Commissioner upon examination *so decided*. His decision to that effect was the judgment of a court of competent and exclusive jurisdiction, upon questions of fact, and is not reviewable in this court in a suit of this character. While the proceedings were pending they were open to contest before the Com-

missioner, and on appeal to the Secretary of the Interior and the President, but no appeal having been taken the judgment became final and cannot be collaterally attacked.

Johnson vs. *Towsley*, 13 Wall., 72.

French vs. *Fyon*, 93 U. S., 169.

But even if the Court could, in this proceeding review the action of the Commissioner, the record shows that the Commissioner's decision was proper and should be affirmed

First. Because the published notice omits the material statement required by the Act of 1860, that a survey and plat of the claim had been approved by the Surveyor General.

Record, folio 65.

Le Roy vs. *Jamison*, 3 Sawy., 386.

Second. Because the "Santa Barbara Gazette," the paper purporting to be the paper published nearest the land, was not published at Santa Barbara but in San Francisco.

Record in case, folios 66—67.

Le Roy vs. *Jamison*, 3 Sawy., 385.

Third. The publication was not made for four successive weeks, as required by the Act. The first insertion was February 14, 1861, the last on the 17th day of March, 1861. (Record, folio 35.) Here is an interval between the dates of thirty-one days and the publication could not have been made in successive weeks.

Hernandez vs. *Creditors*, VI Pacific C. L. J., p. 458.

III

Commissioner Wilson had power to recall the unaccepted patent prepared by his predecessor.

The plaintiffs have introduced into the findings the fact that Commissioner Edmunds, who prepared the patent of 1866, went out of office August 31, 1866, and was immediately succeeded by Commissioner Wilson. That was for the purpose of raising a question as to the power of Commissioner Wilson, with consent of the patentee, to recall the unaccepted patent sent out by his predecessor. This point is relied upon in argument.

The patent reached the Surveyor General's office August 27, 1866, (folio 44). Immediately on receiving notice the then owner of the grant refused to accept the patent and immediately petitioned the *Commissioner* to recall it. The petition could not have reached Washington during Edmund's term, and it did not. It was received by his successor, Wilson.

However the rule may be as to the power of a succeeding executive officer to review the acts of his predecessor, it is very clear that no rule of the kind can apply to any thing but a *final* decree or ruling. It can never have application to a matter not finally disposed of. The transaction of passing the title was *in fieri* until acceptance of the patent by the patentee. There was no *acceptance* but a *rejection*. The transaction was, therefore, uncompleted when Edmunds went out of office and Wilson succeeded him. The latter succeeded to the jurisdiction of the former including the right and duty of completing this unfinished transaction.

The termination of office either of the President or other executive officer, or the death of the incumbent, cannot possibly affect the rights of individuals. Whatever power Commissioner Edmunds had when he went out of office his successor had when he came in. When an official act is closed it can neither be undone by the officer's successor nor by himself. The office never dies and some one is always President. The new incumbent does not commence *de novo*. He takes up everything just where his predeces-

sor left it, and has the same power over the subject. Commissioner Edmunds went out of office before he could receive or act upon the protest of Ward. It was in the Department and his successor had just the same jurisdiction to act upon it as Commissioner Edmunds would have had had he remained in office.

The recall by Commissioner Wilson of the patent of 1866 and the recall by Commissioner Drummond of the patent of 1870, are entirely dissimilar, both as to the fact and the law applicable to them. The patent of 1866 was not accepted but refused, and was recalled at the request of the patentee. The patent of 1870 was accepted and was recalled against the protest of the patentee. The distinction is obvious.

The cases cited by counsel on pages 34 and 35 of his brief do not establish any different doctrine. In every case cited the question was whether a *final* action of one executive officer could be reviewed by his successor and the opinions hold against such power, for the very reason that the prior decision *was* final, and the officer *functus officio*. The action of Commissioner Edmunds in this case was not final but interlocutory. The transaction could not have been completed without acceptance of the patent. Before that Wilson succeeded to the office and took up the case just where Edmunds left it.

IV.

The owner of the grant was not bound by the publication nor required before tender of patent to take any notice of it.

Counsel for plaintiffs, at page 26 of his brief, claims that the survey became final by publication, and remained unquestioned for five years before it was forwarded to the Commissioner, and he asks that some inference against the

plaintiffs be drawn from that fact. There is nothing in the record to show whether, after the defective publication and while the survey remained in the Surveyor General's office, any efforts were made against further proceedings under it. The owners might, so far as the record shows, have been continuously protesting against and repudiating it during all of that time. But however the fact may be, it is entirely clear that there existed no necessity for any action on the part of the owners during that period. They were absolutely powerless. Their grant had been erroneously located and the survey improperly published—published in such a way as to convey no legal notice to them even if they had, in fact, seen the publication. The law gave them no remedy for the attempted confiscation of their property, either before the Surveyor General or elsewhere, except the right to treat the publication as absolutely inoperative and void. If the fact of the publication and existence of the plat ever came to their notice, which may be reasonably doubted, they had a perfect right upon seeing that the requirements of the act had not been complied with. to treat the matter with entire indifference. It did not bind them or any one else, and they were not called upon to notice it in any way. How the survey came to be transmitted to the Commissioner, at whose instance or request, does not appear. So far as the court is advised, the owners had no notice of that fact even. The first the owner knew of such a proceeding was the tender to him of the patent. This he immediately and formally rejected, and at once petitioned the Commissioner to recall it on the ground, among others, that the publication was defective.

From all this the fair inference is, that the survey was sent up by the Surveyor General in the due course of business, without notice to any one, that in the same course of business the Commissioner passed it to patent, inadvertently overlooking the defective publication, or not having

evidence before him to show it. Certain it is that as soon as the fact of the patent came to the knowledge of the owner he refused to accpet it; petitioned for its recall, and demonstrated the error into which the Commissioner had fallen, and that officer corrected his mistake and issued the new and proper patent.

It is also said (p. 26) that the publication, being equivalent to a patent, imports absolute verity, and that its recitals cannot be questioned. Between proper parties that would possibly be so if it were a legal patent. But it was no patent at all, for the publication was irregular and void and the patent not accepted. Neither can the plaintiffs, who are strangers to our title, be admitted to raise that question.

V.

The owner of the grant was the party entitled to accept or reject the patent.

It is also said (p. 31) that Ward, who was then *sole owner of the grant*, had no right to either accept or reject the patent; that the *grantees* or *confirmees*, Ward's predecessors in interest, were the only persons entitled to say anything or do anything in that regard, and that Ward was entirely at the mercy of his grantors and the United States.

How can such a position be maintained? Whatever rights the original grantees and patentees had passed to Ward. He did not buy such a piece of land as sometime in the future they and the United States might conclude he ought to have. He bought *all their interest in the Gaudaloupe grant*. By such a conveyance he was put in their shoes. He took all their rights, privileges and im-

munities of every description, no more and no less, and these included the right to insist, at all times and in every proper way, that the *whole Gaudaloupe grant* should be so patented as to give him what he bought and what his grantors were entitled to. After their sale the original grantees had no further interest in the matter in any way, except to protect the interests they had conveyed. They would not have been admitted anywhere under any circumstances, as against Ward, to do anything else. When the patent was sent to the Surveyor General it was "to be delivered to the *holders of said grant.*" (Folio 44.) The patent, as is required by law and regulations, ran in the name of the confirmees; but, as is invariably the practice, it was to be delivered to the "holders" of the title. The sole holder and owner of the Gaudaloupe was Ward. He alone was entitled to the custody of the patent, and was alone entitled, by virtue of his ownership, to say whether or not he would take it.

It is also urged that Ward purchased after the publication of the survey and was bound by it. We have already shown that the publication was void. Ward had a right to rely on that fact. It was to him, as well as his grantors, of no effect whatever in limiting or controlling the grant made by the Mexican Nation and confirmed by the United States.

VI.

No presumption of acceptance of the patent of 1866 arises from anything contained in the conveyances through which Le Roy deraigns title.

The plaintiffs in error introduced into the findings the fact that in some of the deeds in the defendant's chain of title, after describing the land conveyed by its name, by

its natural boundaries, and by the date of the grant and names of the grantees, it is stated that the same has been surveyed by Terrill, and they would apparently ask *this court* to find some fact from this recited evidence, an acceptance of or submission to the survey. If it were competent to draw any inference from evidence so stated, none could be drawn from this. The court cannot possibly know, and certainly these ignorant Californians could not have known, without going on the ground with a surveyor, whether, the survey included this land or not.

The conveyances referred to are enumerated and the descriptive portions thereof are recited in the findings, folios 60 to 65 inclusive.

The first of these deeds describes the lands conveyed as follows: (*a*) Rancho Gaudaloupe; (*b*) bounded by Rancho de Nipoma, La Laguna, Casmali and Jesus Maria; (*c*) as granted by the Mexican authorities; (*d*) containing eight leagues more or less in conformity to survey approved by the United States Surveyor General.

The second of these deeds describes the lands conveyed as follows: (*a*) Rancho known as Gaudaloupe; (*b*) bounded by Pacific Ocean, Rancho Balsa de Chemisal, Rancho de Nipoma, Rancho Punta de la Laguna, and Sulphur Hills; (*c*) containing 32,408 acres in conformity to final survey approved by Surveyor-General January 29, 1861; (*d*) the same tract granted by the Mexican authorities; (*e*) the tract confirmed by the District Court. If the finding by the court of the fact of the preparation of the patent for Gaudaloupe of date June 30, 1866, as the same appears in the record, be considered as a finding of *everything recited in the so-called patent*, then the third descriptive call in said deed possibly means the survey upon which said patent was founded. Otherwise there is nothing in the findings to show what survey was approved by the Surveyor General at the date mentioned. The land granted by the Mexican

authorities (fourth descriptive call) was the "rancho Gaudaloupe" (folios 29, 30 and 48). The tract confirmed by the District Court was that "known by the name of Gaudaloupe, being the same land on which the appellees, Diego Olivera and Teodora Arrellanes, now reside; for particular description of said land reference will be had to the map and juridical record of possession on file in the transcript of the record in this case." (Folio 50.)

It will be observed that besides this reference to Terrill's survey, there are in the first mentioned deed *three* and in this last mentioned deed *four other definite calls*, each describing the land covered by the patent of 1870, including the premises in controversy.

The third of these deeds describes the land granted as follows: (*a*) That known as Rancho Gaudaloupe; (*b*) that granted by the Mexican Government; (*c*) the land confirmed by the Board of Land Commissioners. The description given by the decree of the Board is found at folio 49 of the record. It describes the land by name, by the possession of the grantees, by certain natural boundaries and by a map on file in that case. There is nothing in the findings to enable the court to locate the natural objects referred to, nor is the map spoken of in any way further explained.

The fourth of these deeds describes the land as follows: (*a*) by name; (*b*) as granted by the Mexican Government; (*c*) as confirmed by the Board; (*d*) by the natural boundaries above referred to; (*e*) the land described in Terrill's survey made in September, 1860. What the Terrill survey of 1860 was is not shown by the findings except in the recitals of the so-called patent of 1866.

It will be observed that beside the call for Terrill's survey, there are in this deed at least three other definite calls agreeing with the patent of 1870.

The fifth of these deeds, the one passing the title immediately to the defendant in error, Le Roy, describes the land as follows; (*a*) Rancho or tract of land known as Gaudaloupe Rancho; (*b*) the land granted by the Mexican Government.

The reference to Terrill's survey in the conveyances mentioned does not tend to show acceptance thereof for several reasons.

1. The findings do not properly show what the Terrill survey was, or that it in any respect differed from the patent under which defendant in error now claims. This court cannot find the fact. The court below did not do it unless it was effected by finding the fact of the preparation of the so-called patent of 1866, and reciting the same. Unless we are bound by the recitals of this undelivered and rejected patent, and unless such recitals are *findings* against us as to the *locus* of Terrill's survey, this court is without information on that point. Nothing contained in that patent can conclude or be evidence against us. We were not parties to it. We did not know of its preparation. When tendered it was promptly refused, and upon our petition recalled and another one issued. The court below simply found the fact that such a paper had been prepared. How can a recital in such a paper be considered as a finding by the court that the Terrill survey mentioned in the deed differed from the patent of 1870?

2. But if there be a proper finding of the fact, yet nothing is to be presumed therefrom, for in each of the deeds in which the Terrill survey is mentioned, there are several definite and certain calls controlling the mis-description. The obvious intent in each deed was, on part of the grantor to convey, and on part of the grantee to take, the whole Gaudaloupe Rancho as granted, and it will not be contended that the conveyances were ineffectual to accomplish that

object. The reference to the survey is controlled by the other calls and is simply mis-description. *Falsa descriptio non nocet.*

In construing these deeds, the reference to the survey must yield to the other calls. The erroneous description must be rejected in favor of the other descriptions showing the true intent of the parties.

Allen v. *Holton*, 20 Pick., 463;
Anderson v. *Boughman*, 7 Mich., 69;
Bell v. *Sawyer*, 32 N. H., 77;
Abbott v. *Abbott*, 53 Me., 361;
Stanly v. *Green*, 12 Cal., 165;
Haley v. *Amistoy*, 44 Cal., 132;
Serrano v. *Rawson*, 47 Cal., 55;
Lodyes' Lessee v. *Lee*, 6 Cranch, 237.

If any reference is to be made to these deeds, as affecting the question of acquiesence in the survey, they must be construed as a whole, and so construed it is evident that the parties did not intend to be limited by the erroneous survey and cannot, therefore, be said to have accepted it.

The argument proceeds on the assumption that the reference to the survey bound the defendant, notwithstanding the other calls, as an acceptance. Acceptance of what? Of the location as between the United States and the claimants of the tract confirmed. But how can the plaintiffs raise that question here? That is a consideration which might, perhaps, at the proper time have been *urged on behalf of the United States* against any other location than that shown by the patent of 1866. But the Government has since, by its proper officers, having exclusive jurisdiction of the questions involved, determined against such a claim, recalled the patent of 1866, and issued the patent of 1870.

VII.

The delivery of the patent of 1866, to certain strangers did not bind Le Roy.

It is difficult to understand upon what principle of law, the plaintiff in error can claim anything by virtue of the facts found at folios fifty eight and fifty nine of the record, and referred to at page 36 of the brief.

Le Roy appears to have conveyed, long after his patent of 1873, certain small fractions of the Guadaloupe grant, included in *both patents*, and *no part of the land in controversy*, to certain persons, whose successors in interest, without the knowledge or consent of Le Roy, *in 1877*, by an agent, appeared at the Surveyor General's Office and demanded and received the old rejected patent of 1866, which had been sent by Commissioner Drummond to the Surveyor General for delivery to Le Roy, who had refused to take the same. The patent of 1870, including the land conveyed to these parties, had been at that date, for seven years on record in the proper county. They did not need the patent of 1866 to protect their title, even if that patent had any force or validity; and even if they were entitled to receive it to protect their own interests, it is entirely clear that their acceptance of it could not bind Le Roy in any way.

We submit, with great confidence, that the court below committed no error in holding against the plaintiffs on the subject matter of this assignment.

Fifth Assignment.

"5th. The Court below erred in deciding that the patent of the Rancho Punta de la Laguna, under which the plaintiffs claimed, did not convey a valid title, as against the

second patent of the Guadaloupe Rancho, under which defendants claimed title."

We have already attempted to show, and we think successfully, that the patent of 1866, and the survey upon which it was founded, were inoperative; that the patent was properly recalled and a new one issued, and that the latter conveyed all the interest of the United States to the patentee and his assigns. It is now necessary to consider that title, in contrast with that of the Punta de la Laguna, in a suit of this character.

The suit is ejectment. The plaintiff must recover, if at all, upon a legal title paramount to that of defendants. We claim that neither by the publication of their survey, nor by their patent could they, or did they take any title to lands conveyed by our patent. We claim further that even if their survey and patent did give them any title, it is junior and inferior to ours; that the court must look behind the patents and ascertain which of the parties has the older andbetter title; and that defendants, having a *senior* grant, presentation to the board, confirmation and patent, *for a specific tract by boundaries*, are entitled to judgment, as against the plaintiffs' *junior* grant, presentation, confirmation and patent, for a *floating grant*, within exterior boundaries.

I.

The Gaudaloupe grant was a perfect grant under Mexican law, and, therefore, protected from every subsequent grant or confirmation.

The Gaudaloupe grant was not an inchoate, imperfect and merely equitable claim against the United States. It was a perfect title emanating from the former govern-

ment, protected by the laws of nations and by treaty. It was not necessary even to present it in the tribunals established by law for the settlement of those claims, which were inchoate, and merely raised an equity against the United States. It was a perfect title in itself, needing no confirmation or recognition. The papers emanating from the former government constituted a valid conveyance in fee, needing only juridical possession to complete the title to the specific tract designated. That juridical possession was duly given. It was the final act in the investiture of title. It bound the former government, and is equally conclusive on the Government of the United States.

United States vs. *Graham*, 4 Wall., 261.
United States vs. *Pico*, 5 Wall., 539.

Being a grant of that character, it passed a perfect title which could not have been affected by any subsequent action on the part of the former government, or the United States its successor.

Minturn vs. *Brower*, 24 Cal., 644.
Estrada vs. *Murphy*, 19 Cal., 248.
Stienbeck vs. *Moore*, 30 Cal., 498.

When the court has once adjudged that a claimant has a perfect title to land of which juridical possession has been given, the power of the United States to divest any of the title ceases.

Cleland vs. *Pope*, 12 Wheat., 586.
Lytle vs. *Arkansas*, 9 How., 333.
Delaines vs. *United States*, 9 Pet., 133.

II.

The publication of the survey of Punta de la Laguna under the Act of 1860, gave no additional validity to the claim as against Gaudaloupe.

The plaintiffs rely upon their patent, and that is of a junior date to ours. It is not as against us any evidence that the survey was made and advertised under the Act of June 14, 1860. There was no evidence offered of that fact and no finding. This court cannot find the facts.

The real, legitimate *findings* in this case are the so-called first and second conclusions of law:

"1. That the plaintiffs were not seized of the premises in question nor any part thereof at the time of the commencement of this action, or at any time afterwards; and that they were not then and they are not now entitled to the possession thereof.

"2. That the defendant, Le Roy, at the date of the commencement of this action was seized in fee of the premises in question, and he has ever since continued to be seized in fee thereof; and that he and the other defendants named as his tenants at the date of the commencement of this action were, and they ever since have continued to be, in the rightful and lawful possession of said premises and every part thereof."

The first finding also, that at the commencement of the suit, the defendants were in possession, Le Roy claiming as owner under the patent of March 1, 1870, the others as his tenants,—and the fact that said patent was, after deliberate consideration of the Land Department, made out, signed, recorded, countersigned and sealed, is legitimate finding, and establishes beyond any question the right of the defendants.

These findings sustain the jugdment, and there being no motion for a new trial, and no evidence, no bill of exceptions before the Court, the only questions that can be considered are:

1st.—Are the pleadings sufficient to support the findings?

2d.—Are the findings sufficient to support the judgment?

There is contained in the so-called findings a statement of probative matter which is useless there because this court cannot find the facts. The ultimate fact found cannot be affected by findings of probative facts which tend to show error in determining the ultimate fact.

Smith vs. *Aker*, 52 Cal., 217;
Merritt vs. *Wilcox*, Ib., 238;
Wagner vs. *Crowell*, Ib., 399;
Glasscock vs. *Ashman*, Ib., 420;
Magraw vs. *Wheeler*, Ib., 445;
Mining Co. vs. *Taylor*, 100 U. S., 42.

The *patent* is a fact that the court finds, but the court does not find the facts *recited in it*, nor can *this* court find any fact therefrom. Assuming that it is *evidence* of all matters recited in it as against the Government and all parties claiming from the Government by title subsequent, it is not evidence as against us who claim by title older and paramount.

The recital in this patent of the survey, approval and publication are not evidence of these facts as against us, and if they were *evidence* of these facts the Circuit Court has not found them as facts, and no finding can be presumed which is inconsistent with the general finding of title in fee and lawful possession of defendants.

And if that fact were found, all the force and effect which the law gives to it is that of a *patent* under the act.

The patent plaintiff has, but it relates to his petition and his grant, and like all others under the act it is made "with the stipulation that in virtue of the 15th section of said act neither the *confirmation* of this claim, nor this patent shall effect the interest of third persons."

And it has been expressly held by this court, that a final survey under this act, merely settles the fact that a confirmed claim is *correctly located*, and does not affect the question of title in third persons, under other grants, or the correctness of their locations.

Miller vs. *Dale*, 92 U. S., 476.

III.

Title of the parties under the patents of 1870 and 1873.

Conceding, for the sake of the argument, that the recitals of the patent of 1873, are found as facts by the court below, and that said patent conveyed a title, how stands the case as between plaintiffs and defendants?

It appears from the recitals in the patent of 1870, for Guadaloupe, that the grant was made 21st March, 1840; that the petition for confirmation was presented 24th February, 1852. (Folio 48.)

It appears from the recitals in the plaintiffs' patent for Punta de Laguna, of date 1873, that the grant was made December 26th, 1844, and the petition presented 23d March, 1852. (Folio 68.)

It appears further that there was juridical possession delivered of the Rancho Guadaloupe, and the confirmation was not limited to quantity, but was for the place called Guadaloupe, and referred to the record of juridical possession and the map thereto attached. (Folios 50–51.)

The confirmation of the Punta de Laguna on the contrary, was for six leagues, if that quantity could be found within the boundaries given, and no more. (Folios 69–70.)

Two important considerations, in this connection, command attention.

1st. The defendants in error have the senior grant, petition to the Board, confirmation and patent.

2d. The Guadaloupe Grant and confirmation was for a certain place by name, according to a map and juridical possession, and included all the land within certain boundaries. In other words, it was a grant of specific land, identified and pointed out by certain description. On the other hand the Punta de Laguna grant, as made and confirmed, was a *floating grant* for a certain *quantity* of land to be located within a larger tract. The former was a grant for specific premises; the latter a mere float.

The proceedings upon confirmation and patent relate to the *date of the presentation of the claim to the Board of Land Commissioners.* As the deed of the United States, the patent is effective from *that date*, and is a bar to all claims under the United States arising subsequently to such petition.

Moore v. *Wilkinson*, 13 Cal., 478;
Yount v. *Howell*, 14 Cal., 465;
Stark v. *Barrett*, 15 Cal., 361;
Ely v. *Frisbie*, 17 Cal., 250;
Teschmacher v. *Thompson*, 18 Cal., 11;
Lees v. *Clark*, 18 Cal., 535;
Touchard v. *Crow*, 20 Cal., 150;
McGarrahan v. *New Idria Co.*, 49 Cal., 331;
Landes v. *Brant*, 10 How., 373;
Beard v. *Federy*, 3 Wall., 478;
Grisar v. *McDowell*, 6 Wall., 365.

The doctrine of relation so fully enunciated in the above cited cases, carries our title from the United States back to a date anterior to theirs. The same doctrine establishes our title from the Mexican Government as of the date of March 21, 1840, while theirs is of the date of December 26, 1844.

Thus conceding that we are bound by the recitals in their patent; that the court below found such recitals, as

facts, and that their grant is in dignity and character the equal of ours, yet ours is manifestly the earlier and better title and it is clear that they, in ejectment, cannot recover against us on the later and inferior title.

But the grant and confirmation for Punta de Laguna, is not of equal dignity and character with ours. We have a grant and confirmation of a known place, accurately described by boundaries—a specific grant for specific land. They have a certain quantity, and no more, within a larger tract. Neither the former Government, nor the United States succeeding to its rights and duties, could have divested the first specific title given to this particular tract granted us and conveyed it to another; nor can the suggestion of an intention so to do be for a moment entertained when the character of the later grant to Punta de Laguna is considered.

The patent for Gaudaloupe taking effect by relation, necessarily overrides the Laguna patent, later in date and founded on the junior grant and presentation.

Gibson vs. *Choteau*, 13 Wall., 101.
Landes vs. *Brant*, 10 How., 373.

If the owner of a Mexican grant who has obtained a confirmation of a survey is bound by a subsequent confirmation of a survey embracing the same land under another grant, the latter confirmee is equally bound by the decree approving and confirming the first survey; and in such cases the court will look behind the confirmations and ascertain which has the prior equity. The elder grant gives the better title when it calls for a specific tract of land.

Yates vs. *Smith*, 38 Cal., 60.

A patent for lands under a confirmed Mexican grant and final survey, which shows upon its face that it includes land

embraced in a previously approved final survey of another confirmed Mexican grant, is not void as to that portion of the land included in both surveys.

Yates vs. *Smith*, 40 Cal., 662.

In a recent case this court has very clearly declared the law which governs controversies of this character. Plaintiffs in ejectment relied upon a *certification* (by statute equivalent to a patent), made of certain lands by the Land Department to the Missouri Pacific R. R. Co., under its grant by Act, June 10, 1852. Defendants relied upon a *patent* issued to the State of Missouri for swamp land. The swamp land grant was of date September 28, 1850. It will be observed that both parties claimed under grants from the United States, as in the case at bar both parties claim under grants from the Mexican government, to whose rights and duties the United States succeeded. In both cases outstanding legal titles were opposed. The court held that the doctrine of relation carried the defendants right back to the date of the Swamp Act, 1850; that the railroad right was not of earlier date than their grant in 1852; that the *earlier* legal title must prevail; and that as to the character of land, the decision of the Land Department holding that it was swamp was binding and conclusive on the judiciary in an action of ejectment.

French vs. *Fyon*, 93 U. S., 169.

The different classes of these Mexican grants and the respect to which each class is entitled, have been repeatedly defined by this court and in no case has it ever been held that a floating grant of this character, under any circumstances, can prevail over a prior specific grant. On the other hand, the decisions have uniformly subjected these floats to the more definite and certain grants.

This principle is distinctly recognized and affirmed in

the only cases, in our knowledge, where two outstanding patents of the United States for the same land came before this court in suits of ejectment.

Stark vs. *Starrs*, 6 Wall, 402;
Bissell vs. *Henshaw*, 18 Wall, 268;
Miller vs. *Dale*, 92 U. S., 476.

Mr. Justice FIELD, in delivering the opinion of the Circuit court in the case of *Le Roy vs. Jamison*, (3 Sawy., 369), said:

"*The plaintiff* (*defendant in error here*) *having the earlier patent and the elder grant, is entitled to recover unless the validity of the patent or the correctness of the survey of the premises covered by it is successfully assailed.*"

The validity of the patent is not assailed except upon considerations settled by the recent decision of this Court in *McBride* vs. *the Secretary*, or elsewhere noticed in this brief. There is nowhere in the record the slightest intimation that the survey of the premises confirmed was not correctly made, or that it does not accurately locate the land granted and confirmed.

We submit that the Court committed no error in sustaining the Gaudaloupe title as against that of the Punta de la Laguna.

Eighth Assignment.

"8th. The Court below erred in permitting any facts to be shown tending to impeach the first Gaudaloupe patent, the action being one purely at law."

We claim that the record discloses no error in this respect for several reasons:

I.

In the trial of this cause, one of two courses must have been followed. The record does not show which one was adopted.

1. The plaintiffs introduced their patent in evidence, and there rested. Thereupon the defendants introduced their patent of 1870 and rested. In rebuttal, the *plaintiffs* then introduced the so-called called Gaudaloupe patent of 1866; and in sur-rebuttal, the defendants gave in evidence the circumstances attending its preparation and recall on account of the defective publication.

This was the regular and orderly course of a trial under the circumstances of this case; and if it were followed, it is obvious that the point raised is not well taken. If applicable at all, it is only good as against *the introduction, by plaintiffs* in rebuttal, *of the patent of* 1866 *to impeach the patent of* 1870. The defendants would not be considered as impeaching the patent of 1866, but as showing that it was not itself a patent when produced by plaintiffs to impeach the patent of 1870, already in evidence.

2. The plaintiffs introduced not only their own title, but the supposed title of their adversaries, to wit: the patent of 1866, and there rested. Thereupon the defendants introduced their real title, the patent of 1870, and evidence to show that this last-mentioned patent was the only valid patent ever issued, and that the called patent produced by plaintiffs was absolutely void, and had been set aside by proper authority.

If this course were adopted, the point raised would not be available. The evidence introduced by defendants would not impeach the patent to Gaudaloupe. It would sustain the only legal patent by preventing its irregular impeachment by the invalid patent of 1866.

II.

In ejectment, evidence can be introduced to show that a patent was issued against or without authority of law, and is therefore void. This principle is several times asserted in the brief of counsel, and we do not question it.

Now, the patent of 1866 was prepared against and without the authority of law. The act of 1860 repealed the act of 1851. The former was for several years and at the period in question the only statute under which the Commissioner could issue a patent. That act only authorized him to patent surveys where they had been finally approved by the Court, or when they *had been published in conformity to the act*, without objection. The evidence offered tended to show that *no publication, in conformity to the act, had been made*, and that therefore the patent had been issued without authority of law. In this view it was competent and admissible.

III.

But, even if improper evidence had been admitted, that error can only be corrected in this Court by bill of exception. If offered, objected to, admitted, and exception taken, all that must be shown by bill of exception. In this case, there was no motion for a new trial; there are no bills of exception, and no evidence. If the objection were good originally, the plaintiffs cannot avail themselves of it in this court in this form.

Second Assignment.

"2d. The court below erred in refusing the plaintiffs a judgment for possession of the demanded premises, and for their costs of suit and damages, upon the facts found, and also for part of an answer denying the plaintiffs' title."

By reference to the brief of counsel, at pages 50–51, it will be seen that it is claimed the plaintiffs are entitled to judgement, *in this court*, because of an alleged failure on the part of the defendants to deny in their answer a material averment in the complaint, as to the ownership of the premises by plaintiffs. The point was not raised, considered or decided, in the court below.

I.

The answer does specifically deny every material allegation of the complaint.

The allegation of ownership by the plaintiffs is in the following words:

"They were, ever since have been, and now are the owners and entitled to the possession of *all* that certain piece, parcel, or tract of land situate and being (here follows a description of the premises), containing about five thousand, one hundred acres of land, *and being a part of the rancho known as the Punta de la Laguna.*" (Folios 2–3.)

The answer is in the following words, so far as material to this enquiry:

"They deny that on the first day of June, 1877, that said plaintiffs were, or at any time since have been, or now are the owners, or entitled to the possession of *all* that certain piece, parcel or tract of land described in the complaint, or *that there is any such tract of land in the Rancho Punta de la Laguna*, or that the tract of land included in the metes and bounds in said complaint *is a part of the Rancho known as the Punta de la Laguna.* * * * * * * *

And for a further answer defendants say that the said Theodore Le Roy is the owner of Rancho Gaudaloupe, of which the premises described in the complaint, or intended to be,

form a part; that said rancho was granted by the Republic of Mexico, and confirmed and patented by the United States to Diego Olivera and Teodora Arrellanes; that said grant and patent are severally older than the grant and patent of the rancho Punta de la Laguna, under which the plaintiffs claim title."

It will be observed that every allegation is specifically denied, just as it is made. The plaintiffs say they are the owners "of *all* that certain piece, &c." The denial is just as broad as the allegation, and that is all that is necessary or proper. The criticism seems to be that the defendants did not deny that plaintiffs were owners of the whole and *each and every part thereof*. The defendants were clearly not called upon to deny anything not asserted by the plaintiffs. The complainant did not allege ownership of the whole and each and every part thereof, unless that is implied, in the general allegation quoted. And a denial in precisely the same words must be a denial of everything properly implied. The words cannot mean one thing in the complaint and something else in the answer.

But further: The complaint also describes the premises owned as "part of the rancho known as Punta de la Laguna." The answer denies that fact specifically, and avers that the same premises are owned by the defendant, Le Roy, under the Gaudaloupe grant, and also denies unlawfull and wrongfull withholding of possession.

There is no allegation of the complaint not specifically and fully denied by the answer, and we submit that the answer is abundantly sufficient.

II.

But it is the settled practice in California not to notice objections of this character, when raised in the first instance in the appellate court. If not raised in the trial

court, the Supreme Court will not entertain or decide them.

The court will not reverse a judgment for any defects in the complaint which fall short of an entire absence of material and indispensible matter. If the complaint, as a whole, shows a cause of action, however defectively it may be stated, it will be sustained.

Halleck vs. *Jardin*, 34 Cal., 174.
Hibernia Co. vs. *Ordway*, 38 Cal., 679, 682.

If the parties go to trial upon a defective or insufficient answer without taking exception to it for such insufficiency, but on the contrary try the case on its merits as though the issue were properly made, the objections will not be entertained by the appellate court nor the judgment reversed on that ground.

King vs. *Davis*, 34 Cal., 106;
Dikeman vs. *Norris*, 36 Cal., 94;
Lee vs. *Figg*, 37 Cal., 328;
Cave vs. *Crafts*, 53 Cal., 141;
Spicer vs. *Duane*, 54 Cal., 177.

The cases cited by counsel at page 50 of his brief, are nothing to the contrary, and even if they were, they are obviously overruled by the later decisions.

The Judgment in Le Roy vs. Jamison et al, is an Estoppel, Concluding Plaintiffs in Error.

It was found by the court that on the 19th of December, 1873, Le Roy filed his complaint against Tobias B. Jamison and others, in the same Circuit Court for the same land, "and the *plaintiffs in this case* claiming to be the owners of undivided interest in the aforesaid *Rancho Punta de la Laguna*, which adjoins the said Rancho *Gaudaloupe*, together with others, *their tenants in common, in conse-*

quence of such ownership, united with the defendants in the defence of the said action in the names of the said defendants; and the said Le Roy in said suit alleged his seizen and claimed to recover under and by virtue thereof; and the said *plaintiffs herein*, William Adam and J. L. Shuman, together with their *co-owners in said Rancho Punta de Laguna*, but without becoming parties to the record by name, employed and paid counsel in said suit and defended said action for and in the names of said defendants, &c."

The court further found that in such action the said Le Roy had judgment; that writ of possession issued; that he was put in possession June 2, 1876, and that he still holds under said judgment which remains in force and unreversed. (Folios 81–82–83–84.)

The question presented upon this finding is whether the plaintiffs in error, two of the tenants in common, owning the undivided fee of the Rancho Punta de la Laguna who, in connection with their co-owners, united with the defendants in said suit, then the tenants of said owners of the Rancho Laguna—in the defence of said action, claiming such title as aforesaid, and employed and paid counsel therein but without becoming parties to the record by name, are bound by the judgment entered in said suit by way of estoppel or otherwise.

It is a general and elementary principle that judgments *in personam* conclude only parties to them and their privies. The term, parties, in the sense of this rule, however, includes "all persons having the right to control the proceedings, to make defence, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies."

Greenleaf on Evidence, Vol. 1, § 535;
Herman's Law of Estoppel, §§ 43, 59;
Carney vs. *Emmons*, 9 Wis., 114;

Peterson vs. *Lothrop*, 24 Penn. St., 223, 228;
Calhoun vs. *Dunning*, 4 Dall., 120.

The term also includes all persons who *assume* such a right, and all such parties are concluded by the judgment.

McNamee vs. *Moreland*, 26 Iowa, 96;
Stoddart vs. *Thompson*, 31 Iowa, 80;
Brown vs. *Sprague*, 5 Denio, 550.

In certain cases and under certain circumstances, persons, equitable owners, and persons really interested in the results of a suit or the question involved, and who have notice of the proceedings, are concluded by the judgment, although not parties by name or in fact.

Rogers vs. *Haines*, 3 Greenlf., 362;
Castle vs. *Noyes*, 4 Kernan, 329;
Love vs. *Gibson*, 2 Fla., 598;
State vs. *Jennings*, 14 Ohio St., 73.

A judgment is conclusive not only between the real parties, but also between all who are substantially, though not really and nominally parties.

Kennersley vs. *Orpe*, 2 Doug., 517;
Simpson vs. *Pickering*, 1 Cr. Mr. R., 529;
Struots vs. *Bovingdon*, 5 Ep., 56;
Hancock vs. *Welsh*, 1 Stark, N. P. C., 347.

An action at law to recover the possession of land in California is not the common law action of ejectment. It is more like the writ of right—all fictions are done away with. The suit is between real parties. The plaintiff must be who is entitled to the possession, and the defendant must be he who unlawfully withholds the possession.

The suit can only be brought against the *terre tenant*. The landlord cannot be made a party defendant.

Garner vs. *Marshall*, 9 Cal., 268;
Burke vs. *Table Mountain Co.*, 12 Cal., 408;

Klink vs. *Cohen*, 13 Cal., 623;
Dutton vs. *Warschauer*, 21 Cal., 609;
Fogerty vs. *Sparks*, 22 Cal., 148;
Owen vs. *Fowler*, 24 Cal., 194;
Lytle vs. *Rollins*, 25 Cal., 440;
Hawkins vs. *Reichart*, 28 Cal., 536.

The landlord is neither a necessary nor proper party defendant, and if he is made a party, the court will direct a *non-suit* to be entered as to him.

Dimmick vs. *Derringer*, 32 Cal., 490;
Husman vs. *Wilke*, 50 Cal., 252.

But the landlord, where the tenant is sued, may defend the suit in the name of the tenant.

Roland vs. *Kreyexhagen*, 18 Cal., 455;
Dutton vs. *Warschauer*, 21 Cal., 609;
Dimmick vs. *Derringer*, 32 Cal., 490.

And so defending, he is entitled to control it in all its stages to final judgment, even when he is not made a party to the record by name.

Dutton vs. *Warschauer*, 21 Cal., 609.

If he does so defend the suit, either with or without becoming a party to the record by name, he is bound and estopped by the judgment to the same extent as the defendant.

Valentine vs. *Mahoney*, 37 Cal., 393;
Russell vs. *Mallon*, 38 Cal., 259.

And it seems that the landlord is barred by the judgment, not only in cases where he has in fact united in the defence of such a suit but also in cases where he was notified of the pendency of such a suit by the tenant and failed to defend the same.

Douglas vs. *Fulda*, 45 Cal. 592.
Chant vs. *Reynolds*, 49 Cal. 216.

A former judgment in ejectment in California, in a suit where title is put in issue and tried will conclude all parties and privies from again litigating the same title in another action between the same parties or their privies. If the same title is involved which was in issue or might have been asserted in a former proceeding, the judgment therein binds all parties by way of estoppel.

Gray vs. *Dougherty*, 25 Cal. 273;
Caperton vs. *Schmidt*, 26 Cal. 479;
Vance vs. *Olinger*, 27 Cal. 359;
Mahoney vs. *Winkle*, 33 Cal. 458;
Amesti vs. *Castro*, 49 Cal. 329.

It was for many years unsettled whether an estoppel could be relied upon as conclusive in evidence, when not specially pleaded. The earlier cases seemed to consider the special plea necessary. This rule, however, was differently stated in the celebrated case of the Duchess of Kingston (20 How. St. Tr. 355) and from that date to the present time, the tendency and current of decision has been to admit the estoppel as conclusive in evidence. The rule is now well settled that it is admissable where the pleadings are in such form that opportunity to plead is not given.

Duchess of Kingston, 2 Smith's L. C., 6 A. E. p. 665–8.
Bigelow on Estoppel, p. 520.
Herman's Law of Estoppel, p. 541.
Marsh vs. *Pier*, 4 Rawle, 284.

And it has been expressly decided by the Supreme Court of California that in an action of ejectment in that State the former judgment is admissable in evidence and is conclusive as a bar without pleading it.

Clink vs. *Thurston*, 47 Cal. 21.

In the case at bar the complaint is not so framed as to make the estoppel of the former judgment either necessa-

rily or properly pleadable. A plea in bar would not necessarily answer all the case of the plaintiffs as the same might be developed in evidence. It would therefore demurrable. This is one of the settled exceptions to the old rule requiring the matter of estoppel to be pleaded.

Biddle vs. *Wilkins*, 1 Pet;, 686;

P. W. & B. R. R. vs. *Howard*, 13 How., 308.

The objection that the judgment should pleaded, if well founded, can only be made when the same is offered in evidence. If not then made the objection is to be considered as waived.

Flaudreau vs. *Downey*, 23 Cal., 354;

Jackson vs. *Lodge*, 36 Cal., 38;

Clink vs. *Thurston*, 47 Cal., 29.

The plaintiffs in error are not relying upon any title acquired after su h judgment or suit brought. They rely upon their patent, which was issued October 2d, 1873, (Record, folio 67.) This was forty eight days prior to the commencement of the suit in Le Roy vs. Jamison. (Record, folios 81–82.) At the commencement of said suit, therefore, the plaintiffs in error, were possessed of all the title now set up and relied upon in the case at bar. If the patent gives them any new title, in the sense of the rule, they had such title at all times during the pendency of the suit referred to. It was a title which might have been asserted.

"If it be conceded, therefore, that the title which the plaintiffs now hold under their patent, is the same title which was in issue or *might have been asserted* in the former action, there would be an end of the argument."

Amesti vs. *Castro*, 49 Cal., 329.

The findings in the case at bar show that the patent for the rancho *Punta de la Laguna* was issued forty eight days prior to the commencement of the suit referred to; that

the plaintiffs in error were then owners of an undivided share of said rancho; that as such owners, and so claiming title, they assumed the defence of the case in the names of the defendants. The titles in issue were necessarily that of Le Roy, under the Guadaloupe patent of 1870, and that of the plaintiffs in error, under their patent of 1873, for the rancho Laguna.

That the Punta de la Laguna patent of date, 1873, was was in f ct introduced in evidence and relied upon in said cause, as against the Guadaloupe patent of 1870,is shown by the opinion of Mr. Justice *Field*, in said case, repor ed 3 Sawyer, 369.

The Cases of Le Roy vs. Clayton and Le Roy vs. Jamison.

The importance of the questions involved has led counsel to prepare a brief so extended, as perhaps to weary the court. Our apology is the desire to have the questions involved finally decided by the court of last resort. The same questions have already been twice decided by the circuit court, in other cases involving these two grants and patents, one involving these identical premises.

In submitting the case we invite the attention of the Court to the opinions of the learned judges delivered in those cases in the circuit court, fully and conclusively settling in our favor, by unanswerable argument, every point presented in the case at bar.

Le Roy v. *Clayton*, 2 Sawy., 496;
Le Roy v. *Jamison*, 3 Sawy., 369.

We submit that the judgment of the court below should be affirmed with costs.

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